

5-18-2010

McDevitt v. Sportsman's Warehouse, Inc. Clerk's Record v. 3 Dckt. 37244

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Volume 3

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

EILEEN MCDEVITT

Plaintiff/Appellant

and

SPORTSMAN'S WAREHOUSE, INC.

Defendant/Respondent

LAW CLERK

and

FIFTH

Appealed from the District Court of the
Judicial District for the State of Idaho, in and

RANDY J. STOKER County

Hon. District Judge

JEFFREY HEPWORTH

X

Attorney for Appellant

JEREMY BROWN

Attorney **X** for Respondent

Filed this day of , 20

MAY 18 2010

Clerk

By

Supreme Court Court of Appeals
Entered on ATS by

Deputy

CARTON PRINTERS, CALDWELL, IDAHO 83605

37244

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

EILEEN MCDEVITT, an individual)	SUPREME COURT NO 37244-2009
)	DISTRICT COURT NO. CV 07-5749
Plaintiff/Appellant,)	
)	
vs)	
)	
SPORTSMAN'S WAREHOUSE, INC., a)	
Utah Corporation,)	
)	
Defendant/Respondent,)	
)	
CANYON PARK MANAGEMENT I, INC.,)	
An Idaho corporation, CANYON PARK)	
L.L.C., an Idaho Limited Liability Company,)	
CANYON PARK DEVELOPMENT, L.L.C.,)	
An Idaho Limited Liability Company,)	
NEILSON & COMPANY, L.L.C., an)	
Idaho Limited Liability Company,)	
ECKMAN & MITCHELL CONSTRUCTION,)	
L.L.C., a Utah Limited Liability Company,)	
JOHN DOE and JANE DOE, husband and)	
wife, I through X, and BUSINESS ENTITIES)	
I through X,)	
)	
Defendants.)	

CLERK'S RECORD ON APPEAL
VOLUME 3

Appeal from the District Court of the Fifth Judicial District
of the State of Idaho, in and for the County of Twin Falls

HONORABLE RANDY STOKER
District Judge

Jeffrey Hepworth
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ATTORNEY FOR RESPONDENT

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DISTRICT COURT
TWIN FALLS CO., IDAHO
FILED

2009 NOV 20 AM 1:13

BY  CLERK
DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

EILEEN ANN McDEVITT, an
individual,

Plaintiff,

v.

CANYON PARK MANAGEMENT I, INC.,
an Idaho corporation, CANYON PARK,
L.L.C., an Idaho Limited Liability
company, CANYON PARK
DEVELOPMENT, L.L.C., an Idaho
Limited Liability Company, NEILSEN &
COMPANY, L.L.C., an Idaho Limited
Liability Company, ECKMAN &
MITCHELL CONSTRUCTION, L.L.C., a
Utah Limited Liability Company,
SPORTSMAN'S WAREHOUSE, INC., a
Utah corporation, JOHN DOE and JANE
DOE, husband and wife, I through X,
and BUSINESS ENTITIES 1 through X,

Defendants.

Case No. CV 07-5749

**AFFIDAVIT OF JEFFREY
J. HEPWORTH IN SUPPORT
OF MOTION FOR
RECONSIDERATION**

AFFIDAVIT OF JEFFREY J. HEPWORTH IN SUPPORT OF MOTION FOR
RECONSIDERATION - 1

0 305

STATE OF IDAHO)
) ss.
County of Twin Falls)

JEFFREY J. HEPWORTH, being first duly sworn, upon oath deposes and states as follows:

1. I am the attorney for the Plaintiff in the above entitled action and make this affidavit of my personal knowledge and belief.

2. On the 10th day of November, 2009, the Court filed its Memorandum Opinion Granting Sportsman's Motion for Summary Judgment in regard to the above-entitled matter.

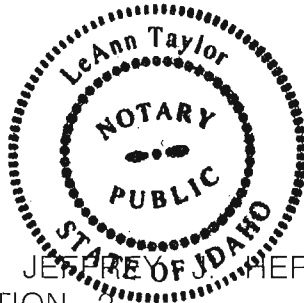
3. At the time of the argument, the deposition transcript of expert Glenn Arrington was not available. In order to properly analyze this case Mr. Arrington's testimony is important and should be considered. See Affidavit of Glenn Arrington attached hereto as Exhibit "A".

4. Also attached hereto as Exhibit "B" is the deposition transcript of Glenn Anderson.

DATED this 19th day of November, 2009.


Jeffrey J. Hepworth

SUBSCRIBED AND SWORN to before me this 19 day of November, 2009.




NOTARY PUBLIC FOR IDAHO
Residing at: Home
My Commission Expires: 10/16/11

AFFIDAVIT OF JEFFREY J. HEPWORTH IN SUPPORT OF MOTION FOR RECONSIDERATION - 2

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 161 5TH Avenue South, Suite 100, Twin Falls, Idaho, certifies that on the 19th day of November, 2009, he caused a true and correct copy of the AFFIDAVIT OF JEFFREY J. HEPWORTH IN SUPPORT OF MOTION FOR RECONSIDERATION to be forwarded with all required charges prepaid, by the method(s) indicated below, to the following:

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Twin Falls, ID 83303-1276
*Attorneys for Canyon Park, LLC, Canyon Park
Development, LLC, & Neilsen & Co. LLC
Canyon Park Management I, Inc.*

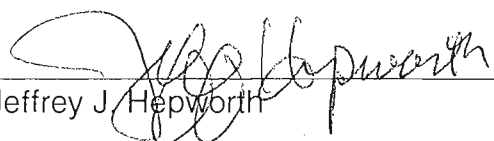
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Attorneys for Sportsman's Warehouse, Inc.

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U.S. Mail	_____✓_____
Fax	_____
Fed. Express	_____

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Idaho Falls, ID 83405
*Attorneys for Eckman & Mitchell Construction,
LLC.*

Hand Delivered	_____
U.S. Mail	_____✓_____
Fax	_____
Fed. Express	_____



Jeffrey J. Hepworth

C 368

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DEPOSITION OF GLENN S. ARRINGTON - 10/16/09

SHEET 1 PAGE 1

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

EILEEN ANN MCDEVITT, an individual,)
)
Plaintiff,) Case No.
vs.) CV 07-5749
)
)
CANYON PARK MANAGEMENT I, INC., an)
Idaho Corporation; CANYON PARK, LLC,)
an Idaho Limited Liability Company;)
CANYON PARK DEVELOPMENT, LLC, an Idaho)
Limited Liability Company; NEILSEN &)
COMPANY, LLC, an Idaho Limited)
Liability Company; ECKMAN & MITCHELL)
CONSTRUCTION, LLC, a Utah Limited)
Liability Company; SPORTSMAN'S)
WAREHOUSE, INC., a Utah Corporation;)
JOHN DOE and JANE DOE, husband and)
wife, I through X; and BUSINESS)
ENTITIES I through X,)
)
Defendants.)

DEPOSITION OF GLENN S. ARRINGTON

Friday, October 16, 2009, 8:00 a.m.

Twin Falls, Idaho

Sandra D. Terrill,
RPR, CSR

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EXAMINATION

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DEPOSITION OF GLENN S. ARRINGTON

BE IT REMEMBERED that the deposition of Glenn S. Arrington was taken by the attorney for the defendants at the office of Tolman Brizee & Martens PC, located at 132 3rd Avenue East, Twin Falls, Idaho, before Sandra D. Terrill, Court Reporter and Notary Public, in and for the State of Idaho, on Friday, October 16, 2009, commencing at the hour of 8:00 a.m., in the above-entitled matter.

APPEARANCES

For Defendant Eckman & Mitchell Construction, LLC:
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PAGE 4

1 (The deposition proceeded at 8:02 a.m.
2 as follows:)

3 Glenn S. Arrington,
4 produced as a witness at the instance of the
5 defendants, having been first duly sworn, was
6 examined and testified as follows:

EXAMINATION

9 BY MR. WILLIAMS:
10 Q. Will you state your full name for the
11 record.
12 A. My name is Glenn Steven Arrington.
13 Q. And you have had your deposition taken
14 before, have you not?
15 A. Yes, I have.
16 Q. Normally what we do is go through your
17 background extensively, but I understand there are
18 some time constraints today that maybe you and
19 others may have.
20 For the record, we rescheduled your
21 first deposition to allow me more time, adequate
22 time, but in an effort to keep this going, we'll
23 try and complete it by noon.
24 Obviously, I can't speak for all the
25 parties and their attorneys, but I'll do my best.

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1 MR. WILLIAMS: One thing, if agreeable, is
2 I'll just briefly cover his background and not go
3 into it extensively and reserve the right to leave
4 the deposition open should somebody challenge his
5 qualification as an expert. I don't think anyone
6 would do that, at least within his sphere, but if
7 that does come up, we'll reserve the right to
8 reopen the deposition with that purpose alone.

9 Q. BY MR. WILLIAMS: But why don't you,
10 with that statement in mind, give us a brief sketch
11 of your business, Starr Corporation, what you did
12 as a general -- I know because we've worked
13 together before, but for the record can you give us
14 a brief sketch of your company and your experience
15 and education and so forth.

16 A. The construction company was started
17 by my father and his brother in 1962. I was 10
18 years old at the time and so my initial experience
19 in construction was purely as a laborer and a
20 helper. Through the years, as I gained experience,
21 my opportunities for work increased.

22 In 1985 I began purchasing out my
23 father's interests in the company. In 1989 I
24 purchased the interest of my uncle and his sons and
25 renamed the business Starr Corporation.

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1 At that point in time my field
2 experience had become very, very limited and I was
3 solely management. My responsibilities included,
4 of course, all contract administration, all
5 business management, as well as bottom line for
6 safety issues and productivity issues within the
7 company.

8 The company -- I sold my interest to
9 my son in January of 2009. At that time we were
10 putting in place -- well, the years varied --
11 between 20 and 40 million dollars worth of
12 construction on an annual basis doing projects as
13 design bid build, traditional general contractor
14 firm, as construction managers and as design-build
15 contractors.

16 Q. Tell us a little bit about Starr
17 Corporation and the kind of projects they had. And
18 is it two R's, is it not?

19 A. It is two R's. Starr Corporation is a
20 commercial and industrial building contractor. We
21 are located here in Twin Falls. Currently the
22 projects that are under construction are the CSI
23 health sciences building. That is a design-build
24 project. A facility for St. Jerome's Catholic
25 Church, which is also a design-build project.

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1 We just completed a scattering of
2 projects for the Kimberly School District, totaling
3 a little over \$10 million. That was also design
4 built. We are -- they are currently under contract
5 with the Corps of Engineers to do some building
6 remodels at the Mountain Home Air Force Base.
7 Maybe \$4 million among them. We have done work for
8 Dell Computer, for Glanbia Foods, for Solo Cup.

9 Q. All right. That gives us a fair
10 sprinkling. And I've been in your offices and you
11 have photos, or at least a few years ago when we
12 were working on a case with Mr. Hepworth, in fact,
13 you had photos of many of your buildings, as you've
14 said, a large variety of commercial buildings and
15 projects, not only in Twin Falls, but other states
16 or cities as well, true?

17 A. Correct.

18 Q. Now, have you built -- you're
19 familiar, I presume, with Canyon Park Development
20 down the road here that's involved in this
21 litigation?

22 A. Yes.

23 Q. Before this litigation I presume
24 you've been there and were familiar with that
25 development?

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1 A. With some selected stores.

2 Q. A frequenter of the Sportsman's
3 Warehouse, I presume?

4 A. Yes.

5 Q. And I think there's a TJ Maxx next to
6 the Sportsman's and then a series of retail stores
7 on down the line in that development?

8 A. Yes.

9 Q. You didn't build any buildings within
10 that, your company, did you?

11 A. We did not.

12 Q. Are you familiar with the Canyon Park
13 Development's owners or who those folks are or
14 their companies?

15 A. I believe that the Neilsen Company is
16 involved in it. That is really all I know, and
17 that's rumor or supposition.

18 Q. I don't know if you watched the
19 project as it was built starting off with the first
20 stores and the parking lot and the landscaping, and
21 later the Sportsman's Warehouse was built there and
22 then completed. Did you observe any of that as it
23 was taking place and developing over time?

24 A. I have no specific memories of it. I
25 probably was aware, and that's about the best --

1 Q. But you at least have been to
2 Sportsman's Warehouse as a customer on probably
3 more than one occasion, if I infer from your
4 answer?
5 A. Yes.
6 Q. And I don't know if you've made any
7 visits to the site in connection with this case, or
8 have you?
9 A. I have.
10 Q. And when was that?
11 A. Approximately six weeks ago.
12 Q. And what was your purpose in going?
13 A. To take a closer look at the valve box
14 that is in question here to see it better than I
15 could see it in the photographs.
16 Q. What did you discover?
17 A. It's not there.
18 Q. Was that the first time you became
19 aware of that, obviously, or you wouldn't have gone
20 there?
21 A. Yes, that was the first time.
22 Q. And I'm assuming in your large pile
23 there you've seen photographs of the green valve
24 box?
25 A. Yes, I have.

1 Q. And I think there's been photographs
2 from many sets. I'm not going to try and parse out
3 which ones you've looked at. We'll just assume
4 you've seen ample pictures of it.
5 Was there something that you were not
6 able to see in the pictures that you wanted to see
7 on a visual inspection? Was that your reason in
8 going?
9 A. Yes.
10 Q. What did you hope to see that you
11 couldn't see in the pictures?
12 A. I hoped to see a little clearer detail
13 of the face of the concrete immediately abutting
14 the plastic box.
15 Q. Did you notice -- I think it's called
16 a city meter box that sits just a few feet away
17 from the green valve box that's no longer there.
18 If I'm being vague --
19 A. I saw the city meter box next to the
20 former location of the green box.
21 Q. That's well worded. Here's --
22 A. Yes.
23 Q. This is a photo. I can't tell if
24 that's a CBM-00011, but I think we all know what
25 we're talking about. This is not an exhibit. Just

1 for ease of our conversation.
2 A. The one with the cast-iron lid is
3 there.
4 Q. And did you make any observations
5 about the concrete in the area and adjacent to and
6 abutting the city meter box?
7 A. I did.
8 Q. And does it appear, basically, to be
9 flush and --
10 A. Reasonably flush, yes.
11 Q. Reasonably flush. Now, let me step
12 back. I don't want to get too far ahead of my
13 outline. Did you do anything else at your
14 inspection at that time?
15 A. No.
16 Q. Did you observe that there's a planter
17 box in front of the store sort of in this area now
18 with a large bronze elk standing in it?
19 A. Yes, I saw that.
20 Q. Were you able to determine through
21 your work in this case that that planter box was
22 not there at the time, at least, that the
23 Sportsman's Warehouse building was constructed and
24 completed in September of '03?
25 A. That was my understanding from

1 inferences and documents that I've read, yes.
2 Q. And there's been some question whether
3 a planter box originally should have been put in
4 and then was later decided to be taken out, but was
5 not put in, and I don't believe it was in at the
6 time of the plaintiff's trip and fall accident in
7 this case in December of '05. Is that your
8 understanding as well?
9 A. It was an item of discussion in the
10 early days of design and construction. That's what
11 I read.
12 Q. Obviously, at some point a decision
13 was made to put one in. It's there now. Did you
14 notice that it had an irrigation box within the
15 planter box itself?
16 A. I did not see the irrigation box in
17 the planter.
18 Q. Had you -- and I'll just see for the
19 record -- gone up and looked behind the elk?
20 There's what appears to be a green box nearly
21 identical, to me, in the planter box itself sitting
22 almost right next to the building.
23 A. I did not explore up in the planter
24 box and did not see that.
25 Q. Didn't root around up there in the

DEPOSITION OF GLENN S. ARRINGTON - 10/16/09

SHEET 4 PAGE 13

1 trees, huh?
2 A. No.
3 Q. They probably wondered what I was
4 doing.
5 In any event, have you read -- well,
6 let's go through what materials you have read, and
7 I think they're listed in your affidavit,
8 paragraph 4. I'll quickly go through those and if
9 there's anything you have read since your affidavit
10 or that you didn't put in your affidavit, let us
11 know. You read the deposition of Glenn Anderson?
12 A. Yes.
13 Q. Did you read that entire transcript or
14 just excerpts from it?
15 A. I read the entire transcript with the
16 exception of the notes and bibliography, or
17 whatever you call it, in the back.
18 Q. Ray Patience, deposition of Ray
19 Patience?
20 A. Again, read in the same manner, in
21 full.
22 Q. And that one was pretty short,
23 uncharacteristically short for an attorney's
24 deposition. Jeff gets right to the point.
25 You recall then Glenn Anderson, who he

PAGE 14

1 was and what his involvement in this whole
2 project -- I'll just say project -- was?
3 A. Yes. He was the principal architect
4 of the professional design firm.
5 Q. And Ray Patience, you recall what his
6 basic position, responsibility -- or not --
7 position was and who he worked for?
8 A. My memory is that he was the
9 construction manager for Eckman Mitchell, but I'd
10 have to look to verify that.
11 Q. That's correct. And this isn't a
12 closed book test. I'm just getting a feel for your
13 understanding of who's who and who did what.
14 Scott Duke, you read his deposition?
15 A. Yes, but I don't remember his position
16 by name.
17 Q. He's the guy, I'll represent -- to
18 keep it quick, the guy who -- concrete foreman who
19 poured the concrete and laid it around?
20 A. Yes, I do remember that.
21 Q. And do you remember his description of
22 how he poured that concrete and brought it up next
23 to these boxes and the tools and equipment he used?
24 A. I do.
25 Q. Now, is that something, Mr. Arrington,

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1 that you personally have done over your 35 years, I
2 think, in this business starting off as a laborer?
3 Did you pour concrete and do sidewalks?
4 A. Many times.
5 Q. Manytimes. So you understood his
6 language and what he was saying when you were
7 reading it?
8 A. Yes, I did.
9 Q. And he testified, I believe, at his
10 depo and his affidavit that when he finished that
11 job, that the sidewalks were basically flush with
12 the city meter box and irrigation box. You read
13 that testimony?
14 A. I do remember that.
15 Q. And at the time they left their job, I
16 believe Ray Patience and Glenn Anderson testified
17 that on their walk-through with the developer, the
18 city inspector, that, in their opinion, those were
19 flush at the time they completed in September in
20 '03. Did you read that?
21 A. That's not my recollection. It seems
22 that at least Glenn Anderson was vague on the point
23 saying he really had not taken notice of it.
24 That's my remembrance at this time.
25 Q. Scott Duke was clear that it was flush

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1 when he completed it in his affidavit. I can pull
2 that out.
3 A. I remember that. He was clear.
4 Q. And Ray Patience. But did you read
5 Glenn Anderson's affidavit?
6 A. I don't remember it off the top of my
7 head. Let me take a look at it.
8 Q. The affidavit?
9 A. The affidavit. Not the deposition.
10 Yes, I have read this and now my memory's refreshed
11 on it.
12 Q. And he did indicate during their
13 walk-through there wasn't a one-inch deviation in
14 the concrete?
15 A. No, he didn't indicate that. He said
16 generally --
17 Q. Oh, okay. I see what you're saying.
18 A. -- any lip more than one inch would be
19 noted. He did not say I didn't find one, there
20 isn't one there. But he said, frankly, as a
21 professional, I expect I would have found it. But
22 he did not make a case either way.
23 Q. Fair enough. Now, do you know of any
24 materials you've reviewed, any depositions, any
25 documents, anything that would contradict the

1 testimony of those individuals to state that these
2 actually were not flush at the time Eckman Mitchell
3 completed its construction and turned it over to
4 Sportsman's Warehouse?
5 A. No. I don't remember any firm
6 testimony of anything I've read.
7 Q. Or evidence? Photographs, documents,
8 any kind of evidence to show that it wasn't flush
9 at the time?
10 A. No. I have no -- I don't know of any
11 evidence that would show that.
12 Q. This may not be terribly important.
13 There has been speculation about what caused the
14 difference in elevation. It's been referred to as
15 settling, a depression. Obviously, at the time
16 Ms. McDevitt fell there's about an inch to an inch
17 and a half, I guess, testimony difference between
18 the sidewalk and the irrigation box, and you've
19 seen that?
20 A. By photograph.
21 Q. I don't know if you recall Ray
22 Patience's deposition where he was looking at a
23 photograph and he could see the box had dropped
24 down below the concrete and could see mud. So the
25 box had gone down rather than the concrete had gone

1 depress. Do you have any opinion as to what might
2 have caused that, or would you be required to
3 speculate?
4 MR. HEPWORTH: I object to the form of the
5 question. Go ahead.
6 THE WITNESS: I do have an opinion on that,
7 and it was stated as possible scenarios in the
8 report that I issued on this. The opinion is that
9 the material placed beneath the box either was
10 nonaggregate, nonsolid, and, therefore, allowed the
11 box to settle probably by a combination of pressure
12 from above, be that foot or vehicular traffic, and
13 either the plasticizing or the displacement of the
14 material beneath it.
15 That opinion does not state that I
16 think the pipes were leaking. I don't know the
17 source of the water, but I believe that water was
18 present and allowed it to settle.
19 (Cell phone interruption.)
20 (A recess was taken from 8:24 a.m. to
21 8:44 a.m.)
22 Q. BY MR. WILLIAMS: I think where we
23 left off was you offering your explanation as to
24 the possible cause of the box settling, having to
25 do with the earth underneath the box. I don't

1 up. Did you read that testimony?
2 A. I did read that testimony. I don't
3 remember that detail.
4 Q. Do you agree in looking at all the
5 photographs that the concrete didn't bow up or
6 somehow raise, but the box, rather, went down
7 somehow?
8 A. I share the opinion that the box
9 settled rather than the concrete raising.
10 Q. That was worded better than I could
11 have. So thank you for your precision in your
12 answers. It's important to be precise.
13 Now, people have speculated about what
14 may have caused the box to settle, and two general
15 theories have been offered, one having to do with
16 settling due to some leak of some water.
17 (Cell phone interruption.)
18 Q. BY MR. WILLIAMS: Just on the theories
19 as to the cause of the settling, one theory having
20 to do with some water has been disputed by others
21 that there was no water there. Not important. We
22 can get into that.
23 Another theory that over time perhaps
24 a car or boat or trailer or multiple heavy-weighted
25 vehicles or pedestrian traffic have caused it to

1 remember exactly your terminology. But I guess
2 there are multiple causes possible, that being
3 something pressing down, be it car, truck, trailer,
4 and something underneath not being adequate to keep
5 it from being pressed down, so kind of an immediate
6 precipitating and then an underlying. Is that kind
7 of what you're saying --
8 A. Yes.
9 Q. -- paraphrasing, not as artfully as
10 you had done?
11 And then at some point did you say
12 water may have either through rain or -- you think
13 water may have been involved at some point in that
14 process?
15 A. It is a prime suspect, in my book.
16 Q. Even though I don't think water is
17 piped or hooked up into it, is my understanding,
18 but --
19 A. A waterline runs through the box.
20 Q. Or through.
21 A. But I'm not indicating that I believe
22 there's a leak. I don't know.
23 Q. Yeah. And no one does or could know.
24 Now, let me see. I think you said --
25 in your report you mentioned this. I'm not sure if

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1 I -- I have your affidavit and then previously your
 2 attorney provided us with an expert disclosure for
 3 you which contained some opinions. Is there yet a
 4 third document entitled a report that you prepared?
 5 MS. CANNON: There is to be supplemented,
 6 yes, and I do have that now.
 7 Q. BY MR. WILLIAMS: Something that's in
 8 work, a project in work that you're going to
 9 prepare?
 10 MS. CANNON: If I might explain, because he
 11 was about to prepare his report when we started
 12 this flurry of depositions, I asked him to hold off
 13 on that because I anticipated that he would need to
 14 review some of those depositions to augment that
 15 information that he had been given at the time.
 16 MR. WILLIAMS: All right. Well --
 17 MS. CANNON: But he is preparing a written
 18 report, which I will provide.
 19 MR. WILLIAMS: Well, we will look forward
 20 to receiving that. I guess I will just state --
 21 make a record that we'd like to continue this
 22 deposition to the extent there's something new in
 23 the report that doesn't come out today that we
 24 don't have a chance to explore or exhaust, and we
 25 may not because he doesn't have the transcripts and

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1 agent of the owner during design and construction
 2 protecting the owner's interests and seeing that
 3 the owner receives what he or she expects.
 4 Q. In this litigation who would be the
 5 owner?
 6 A. Whoever hired the architect, and I
 7 believe that contract was signed by Stuart Utgaard.
 8 MR. WILLIAMS: Sportsman's Warehouse?
 9 MR. BROWN: I'm going to object to this
 10 line of questioning. I think the documents speak
 11 for themselves regarding what their
 12 responsibilities are.
 13 Q. BY MR. WILLIAMS: And I'm just trying
 14 to get a general understanding of what the
 15 architect is and then we can look at the document
 16 specifically, if you don't remember, to determine
 17 who the owner is. I'll get to that in a minute.
 18 And then, generally, a general
 19 contractor, what is the role of a general on a
 20 project such as this?
 21 A. I hesitate on answering that question
 22 because you used the term general contractor.
 23 Depositions of various parties involved identify
 24 this as a modified design-build project, and a
 25 design-build project does not have a general

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1 won't have them for -- no pressure, court
 2 reporter -- a week or two.
 3 MS. CANNON: Obviously, I have no objection
 4 to that, but I didn't want to put him behind the
 5 eight ball, given all this information that was
 6 still yet to come that might be helpful.
 7 MR. WILLIAMS: I understand and I empathize
 8 and I think that merely highlights my position that
 9 there is not adequate time to complete discovery,
 10 much less -- but, anyway.
 11 MR. HEPWORTH: Let's get moving along. We
 12 only have three hours and you tend to take three
 13 hours, and there's others of us that would like a
 14 shot.
 15 Q. BY MR. WILLIAMS: Can I do this, can I
 16 make sure we're all on the same page, have you give
 17 me your understanding of some terms that are terms
 18 of art specific to construction, construction
 19 litigation, so we have a clear understanding.
 20 Generally speaking, you know what the
 21 architect is and what his duties and
 22 responsibilities are. Could you give us a brief
 23 definition of what his duties and responsibilities
 24 are on a project.
 25 A. Very briefly, the architect is the

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1 contractor.
 2 But the term general contractor or
 3 constructor, would probably be a better word as it
 4 applies to this project, is the individual or
 5 entity who has the responsibility to gather
 6 materials and assemble them in a manner prescribed
 7 by the design professional.
 8 Q. Gather materials and assemble as --
 9 A. As directed by the design
 10 professional.
 11 Q. The design professional being the
 12 architect?
 13 A. And his team.
 14 Q. Now, are we going from general to
 15 specific? I asked you for a general definition of
 16 architect and then contractor, and now you're
 17 talking -- you gave me one but you're saying design
 18 team. Are you saying in general or are you going
 19 back to this case?
 20 A. I'm still speaking in general. It is
 21 the custom and practice of almost all architectural
 22 firms to hire outside consultants for specific
 23 parts of the project.
 24 Q. Let me go back to some more
 25 fundamental. You say design build. You've

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1 described today your company has done -- is a
2 design-build firm; is that true?
3 A. Yes.
4 Q. So you, obviously, know what a
5 design-build contract is?
6 A. Yes.
7 Q. And you're familiar with in the
8 industry -- standards in the industry there are
9 standard form -- there are recognized standards and
10 forms that define what those terms are, are there
11 not?
12 A. There are recognized forms but not
13 universally accepted.
14 Q. But commonly used by sophisticated --
15 I'll leave out sophisticated. Starr Corporation,
16 others who do similar work, commonly use standard
17 form agreements that have been promulgated within
18 the industry, true?
19 A. That is true, and great leeway is
20 taken in private interpretation by each firm.
21 Q. And what is -- just give me the
22 simplest way to describe what a design-build
23 contract is.
24 A. It is a single source entity providing
25 all services necessary to design and construct a

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1 Do you have with them a standard contract?
2 A. Yes.
3 Q. And do you have a standard form
4 contract with the owner of the office that's hiring
5 you to construct it?
6 A. Yes.
7 Q. What is the standard form agreement
8 you use? Is it part of the AIA family of
9 documents?
10 A. It is. We use -- we have the
11 electronic version of AIA and use it almost
12 exclusively.
13 Q. And are they recognized within the
14 industry as kind of the -- where you want to
15 contract, that's the standard in the industry to
16 use those documents and you can modify them to fit
17 your needs, but those are the ones you use and
18 recognize, correct?
19 A. Many owners, contractors, and
20 architects or design professionals recognize and
21 use it. There are opinions that the AGC family of
22 documents is better. However, we subscribe to AIA.
23 Q. Sure. Now, design team -- you
24 contract with a design firm, I guess, an
25 architect's firm, correct?

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1 certain facility or improvement.
2 Q. A single source design --
3 A. A single source -- oh, I'm sorry.
4 Q. That was your word, a single source
5 provides design and construction?
6 A. That wasn't my words, but that's the
7 paraphrasing of, yes.
8 Q. Okay. So, for example, when Starr
9 Corporation is hired, they will both design and
10 construct an office building here in Twin Falls?
11 A. Yes.
12 Q. Who in Starr is qualified to do the
13 design work? Who does that?
14 A. No employee of Starr Corporation is
15 qualified to do that.
16 Q. Who does Starr have do the design or
17 draw up the plans, the blueprints, that kind of
18 thing?
19 A. We hire licensed professional design
20 firms.
21 Q. You hire them?
22 A. Yes.
23 Q. So they're part of your team?
24 A. Yes.
25 Q. Is that in a written form of contract?

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1 A. Yes.
2 Q. And do you consider them part of your
3 team then in building an office, part of your
4 design team?
5 A. Yes.
6 Q. Now, in this case I have read in the
7 brief and a reference in Glenn Anderson's
8 deposition to the phrase design build. But from
9 everything you've reviewed, is it your opinion that
10 this project between Eckman Mitchell/Sportsman's
11 Warehouse was a design-build contract?
12 A. No. I think they used the
13 terminology, but they don't fit the definition or
14 the standards that I would apply to design build.
15 Q. And have you been given a copy of the
16 contract between Eckman Mitchell and Sportsman's
17 Warehouse?
18 A. Yes, I have.
19 Q. And is that an AIA document?
20 A. It is. It's a 1997 version of an AIA
21 document.
22 MR. WILLIAMS: Okay. Let's make this
23 Exhibit *-001.
24 (Exhibit *-001 marked.)
25 Q. BY MR. WILLIAMS: Let's look at what

1 I've marked as Exhibit *-001, which is -- Exhibit
2 *-001 is AIA document A101-1997. Are you familiar
3 with this, which is a standard form of agreement
4 between owner and contractor? You're familiar with
5 this -- not only this specific document but this
6 standard form agreement?
7 A. Yes, I am.
8 Q. And it is recognized as a -- in the
9 industry as, I guess, a standard form agreement
10 between an owner and a contractor?
11 A. It's a very acceptable form of
12 agreement.
13 Q. Thank you. And in this Exhibit *-001
14 the owner is Sportsman's Warehouse, Inc., correct?
15 A. Sports Warehouse, Inc.
16 Q. You're right. Sports Warehouse, Inc.
17 And the project is the Sportsman's Warehouse in
18 Twin Falls, Idaho?
19 A. Yes.
20 Q. And the contractor is Eckman Mitchell,
21 correct?
22 A. Yes.
23 Q. And the architect is GA Architects?
24 A. Yes.
25 Q. And the price is on page 3, which is

1 A. That's in question. The architect's
2 contract is written to Enterprise Investments for
3 design of this same facility. So I would have to
4 assume that Sports Warehouse, Inc., and Enterprise
5 Investments of Star Prairie, Wisconsin, are a
6 synonymous individual or entity.
7 Q. And I have a note somewhere --
8 A. I do note that Stuart B. Utgaard
9 signed both.
10 Q. And I'm just looking for my note. But
11 to save time I've got a stack here. I'll represent
12 to you -- we can get the note -- Eckman Mitchell
13 has advised me -- I can't remember if it's in a
14 depo or somebody told me. I'm trying to find it.
15 They entered a separate contract with Eckman
16 Mitchell. Sports Warehouse had their own separate
17 contract with the architect. Do you have any
18 reason to dispute that?
19 A. I don't see that it's relevant.
20 MR. BROWN: Object to the form.
21 Q. BY MR. WILLIAMS: I don't think it's
22 relevant either. There's been a suggestion that
23 this was a design-build contract by one of the
24 parties in brief, and I wanted to make sure,
25 getting your expert opinion, that this is not a

1 contract sum of \$2,399,246, correct?
2 A. That is correct.
3 Q. And that was the price that Eckman
4 Mitchell as contractor agreed to be paid by the
5 owner, Sportsman's Warehouse, to construct the
6 building that is not really the subject of this
7 litigation, but it's the one where the sidewalk's
8 located, true?
9 A. You lost me on those terms, but it is
10 the contract for the Sportsman's Warehouse on
11 Bridge View Boulevard in Twin Falls, yes.
12 Q. Signed by Stuart Utgaard, who is the,
13 I guess, owner of Sports Warehouse, and Gary
14 Eckman, who's the owner of Eckman Mitchell. That
15 wasn't a question.
16 So this is a -- what would this be
17 referred to in the industry? This is not a
18 design-build contract, is it, Mr. Arrington?
19 A. It is not. This is a stipulated-sum
20 contract.
21 Q. Thank you. And, in fact, are you
22 aware that -- you are aware that Sportsman's
23 Warehouse contracted with Eckman Mitchell. Are you
24 aware they had a separate contract with Glenn
25 Anderson, the architect?

1 design-build contract and Glenn Anderson is not a
2 part of a design build -- Eckman Mitchell's
3 design-build team. Is that not the case?
4 A. That is my understanding. And the
5 simplest proof of that, to my mind, is that GA
6 Architects did not have a contract with or work for
7 or were responsible to or liable to Eckman Mitchell
8 Construction.
9 Q. Now, I think I've gone through the
10 terms -- terminology. A subcontractor, back to my
11 general definition, what typically -- do you use
12 subcontractors in part of your projects?
13 A. Yes, we do.
14 Q. And what -- this may be stating the
15 obvious, but I need this for our record. What is a
16 subcontractor and who does he deal with and what is
17 he responsible for, in general terms?
18 A. Subcontractors prefer these days to be
19 called specialty contractors, which better
20 describes their work, and that is they are a firm,
21 an entity, or a person who specialize in one phase
22 of the project. They will come in and do that work
23 on behalf of someone else, and that would almost
24 always be the general contractor.
25 Q. Okay. Now, in this case -- I'll try

1 and get this -- is it your understanding the
2 developer was Canyon Park or some of these Canyon
3 Park entities? There's several iterations, but is
4 that your understanding?

5 A. Yes.

6 Q. And they were the ones who developed
7 the Canyon Park Development, that whole series of
8 buildings and offices and shops that we talked
9 about before, correct?

10 A. That's my assumption.

11 Q. And Sportsman's Warehouse entered an
12 agreement with Canyon Park, a lease agreement.
13 Have you seen that document? Let me see if I have
14 it.

15 A. I have not seen that.

16 MR. WILLIAMS: Okay. Well, let's just -- I
17 didn't bring copies. I assumed everyone had --
18 maybe I did. Here you are.

19 I don't think we need to make this an
20 exhibit because everybody has that. I'm sure
21 Jeremy does.

22 Do you have the lease?

23 MR. HEPWORTH: Yeah.

24 Q. BY MR. WILLIAMS: You needn't read
25 this entire thing, but can you see that this is a

1 define it to that level.

2 Q. I think that was in the testimony of
3 either Ray or Glenn, that they were given a
4 pad-ready site and that any testing of the soils
5 upon which the building would have been built was
6 not done by Eckman Mitchell, but rather the
7 developer. Do you have any reason to dispute that,
8 if that's the case?

9 A. No. And with that mention, I do
10 remember them talking about that they did not have
11 a responsibility of soil compaction testing.

12 Q. And in paragraph 6.1 of the lease
13 between Sports Warehouse and Canyon Park, it's on
14 page 6, indicates a pad condition as of the pad
15 turnover date, which is defined above, but it's
16 basically the date the pad is turned over to Eckman
17 Mitchell to build the building, landlord shall have
18 completed initial site improvements, that's Canyon
19 Park, for the shopping center, as described on
20 Exhibit *E-1 attached to this lease. The initial
21 site improvements, in quotes, additionally on or
22 before the latter to occur -- da, da, da --
23 tenant -- the date the tenant opened the premises
24 for business to the public or, B, the date, which
25 is 210 days following the pad turnover date.

1 lease dated April 17th, 2003, between Canyon Park,
2 LLC, and Sports Warehouse, Inc., on the top there?

3 A. Yes, I do.

4 Q. Without going through that, I think
5 it's all -- there's no dispute that this is the
6 agreement between those two entities giving rise to
7 this building and this lease. You've not seen that
8 before today though?

9 A. I have not.

10 Q. I think in your affidavit you've
11 talked about -- and maybe it's discussed in the
12 depositions, I'm sure it is, of Ray Patience and
13 Glenn Anderson -- that Canyon Park developed this
14 site and Sportsman's Warehouse put a building on
15 this site provided by the developer, in its
16 simple --

17 A. In simple form, yes.

18 Q. And that when Eckman Mitchell began
19 its construction, they were given a pad-ready site?

20 A. Yes.

21 Q. And that the developer, Canyon Park,
22 was responsible for the excavation, grading,
23 compacting of the earth where the building was
24 built?

25 A. I have not seen any documents that

1 Then the next sentence, concurrent
2 site improvements. Landlord and tenant agreed to
3 coordinate construction. I don't need to read all
4 of this. It's basically saying the landlord, the
5 developer, will be responsible for initial site
6 improvements, concurrent site improvements, as
7 those terms are defined.

8 A. On exhibits attached hereto.

9 Q. Right. Now, turn to page 20 and 21.
10 And you understand what's going on in that
11 paragraph and those terms are familiar to you?

12 A. Those terms are familiar.

13 Q. Paragraph 40, which is on page 21, and
14 the heading is landlord approval of plans. This
15 lease is contingent upon landlord's reasonable
16 approval of the plans, which approval shall be
17 limited to exterior characteristics only to ensure
18 that the building is consistent and harmonious with
19 the other buildings in the shopping center
20 including considerations of elevation, exterior
21 design, and the siding of the building.

22 Now, you've not read that before
23 today, but do you understand what that's saying to
24 you?

25 A. My understanding of it, yes, I do.

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1 Q. Okay. And you've seen that
2 development and you've seen the nice architectural
3 features and the stonework is consistent throughout
4 that development, true?
5 A. Yes.
6 Q. The facades all have kind of the same
7 features, do they not?
8 A. There's harmony.
9 Q. They all have kind of, I guess,
10 columns going down in front with the stonework
11 built up around the columns?
12 A. Yes.
13 Q. And there's landscaping throughout the
14 parking lot. Did you notice all the nice trees and
15 planters there?
16 A. Subconsciously.
17 Q. Now, I don't know if you have been
18 given a copy of an affidavit of Blaine Pope. Have
19 you seen that? It just recently --
20 A. Yes.
21 Q. -- appeared on the scene and he was
22 deposed yesterday. I don't want to get in a
23 quibble about the exact wording, but basically he
24 said he put in all the landscaping and all -- that
25 whole parking lot. He put the plants and trees in.

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1 Okay?
2 A. Yes.
3 Q. I don't think you knew that before but
4 assume that's the case. And then he did it in
5 front of the TJ Maxx and all the other offices.
6 And then when it came to the Sportsman's Warehouse,
7 he entered a contract with the developer to put in
8 the sprinkler system in the parking lot there. Did
9 you know that?
10 A. I knew that he had a contract to put
11 the sprinkler system out to the parking lot in
12 front of Sportsman's, yes.
13 Q. Have you seen that contract?
14 A. Yes.
15 Q. I just got a copy yesterday.
16 A. Yes, I have.
17 Q. But you've been given a copy of it
18 before today?
19 A. I have.
20 Q. Now, that's already been made an
21 exhibit. I won't make it an exhibit to your
22 deposition, but there it is. I think it's this
23 one. I'm not sure what the one above that was.
24 A. Yes.
25 Q. Now, this contract is the 18th of July

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1 2003 between Idaho Scapes --
2 MR. HEPWORTH: Could I see what you're
3 looking at?
4 MR. WILLIAMS: This is the one we got
5 yesterday, Jeff.
6 Q. BY MR. WILLIAMS: July 17th, 2003,
7 Idaho Scapes, Inc., is the contractor, and Canyon
8 Park, LLC, is the owner. And just to cut to the
9 chase, Mr. Pope owns Idaho Scapes. This was his
10 contract with the developer to put in all the
11 irrigation -- well, read right here -- scope,
12 installation of sprinkler system and landscaping
13 around Sportsman's Warehouse. Okay? You've read
14 that before?
15 A. Yes.
16 Q. And he's going to have drawings done
17 by EHM Drawing, their site plan 304-99, dated March
18 27th, 2003. As-builts to be provided by
19 contractor.
20 Who's the contractor in this?
21 A. Idaho Scapes, Inc., is the contractor.
22 Q. Okay. And his price for this work is
23 20 -- contract amount, 23,188.20. And he testified
24 that he was being paid this amount to put in all
25 the sprinkler systems, as I just said, for the

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1 landscaping around Sportsman's Warehouse. You've
2 seen this before?
3 A. Yes.
4 Q. So it was your understanding the
5 developer hired Idaho Scapes to do the landscape
6 installation and sprinkler work around Sportsman's
7 Warehouse?
8 A. Yes.
9 Q. Now, yesterday --
10 MS. CANNON: May I make one correction? I
11 believe he testified that this contract was
12 specific to the landscaping and irrigation system
13 in the parking lot surrounding Sportsman's
14 Warehouse.
15 MR. WILLIAMS: Right.
16 Q. BY MR. WILLIAMS: So this Mr. Pope,
17 who owns Idaho Scapes, he did all of the landscape
18 installation, sprinklers for that entire
19 development. This piece is just for the parking
20 lot in front of the Sportsman's Warehouse, and he
21 was paid \$23,000 by Canyon Park?
22 MR. HEPWORTH: Object to the form of the
23 question. The document speaks for itself.
24 Q. BY MR. WILLIAMS: But that was your
25 understanding, correct?

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1 A. If I understood the way that you just
2 explained all that.
3 **Q. He did not, Idaho Scapes, contract**
4 **with Eckman Mitchell to put in landscaping, did he,**
5 **sir?**
6 A. Assume --
7 MR. HEPWORTH: I'm going to object to the
8 question on the basis that, clearly, the contract
9 is not clear. I don't think this witness has seen
10 it before today. The testimony -- have you seen it
11 before today?
12 THE WITNESS: Yes, I have.
13 MR. HEPWORTH: The testimony from Mr. Pope,
14 he didn't know what his contract was. He said a
15 number of things and it was very unclear. So
16 unless and until you read Mr. Pope's deposition,
17 you're not going to be able to answer these
18 questions as they're phrased. I'm going to make
19 that objection.
20 **Q. BY MR. WILLIAMS: Reading this**
21 **document is clear to you. This documents that the**
22 **contractor is Idaho Scapes and they are being --**
23 **contracting with the owner, which is Canyon Park?**
24 A. Yes.
25 **Q. That is clear to you?**

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1 Canyon Park to install a sprinkler system and
2 landscaping around Sportsman's Warehouse. That's
3 it.
4 **Q. But now comparing these two documents,**
5 **the lease, which is not an exhibit, between Sports**
6 **Warehouse and Canyon Park, under that lease we've**
7 **just gone over, Canyon Park is making the decisions**
8 **and responsible for the exterior features and**
9 **landscaping done in this project, are they not?**
10 MS. CANNON: I'll object that the witness
11 has not had the opportunity to review the full
12 lease. I think he's already testified to that, the
13 lease between Canyon Park and Sportsman's. You're
14 asking him to compare two documents, one of which
15 he has not reviewed in its entirety.
16 **Q. BY MR. WILLIAMS: Well, just going**
17 **over the provisions we just read, section 6,**
18 **paragraph 40, the site improvements -- concurrent**
19 **site improvements, exterior design, landscaping,**
20 **that's the developer's deciding what he wants in**
21 **and what he wants done. That's all I'm asking.**
22 MR. HEPWORTH: Object to the form of the
23 question. The word developer is somewhat
24 ambiguous.
25 **Q. BY MR. WILLIAMS: Canyon Park.**

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1 A. Yes.
2 **Q. Now, Jeff is correct, Mr. Pope didn't**
3 **remember and didn't understand a lot of things, but**
4 **there is no question about who's hiring him and**
5 **paying him to do all of this work in this contract?**
6 A. Not to my mind.
7 **Q. Okay. And then he said he also put in**
8 **this green irrigation box that's the subject of**
9 **this dispute and he couldn't remember who paid him,**
10 **the developer or Sportsman's Warehouse or Eckman**
11 **Mitchell, but he's been paid for every other square**
12 **ounce of any work he's done by Canyon Park; is that**
13 **true, Mr. Arrington?**
14 MR. HEPWORTH: Object to the form of the
15 question. It misstates the testimony.
16 MS. CANNON: And calls for speculation as
17 well.
18 **Q. BY MR. WILLIAMS: Based on the**
19 **documents you have, isn't that the case?**
20 A. I have no idea if he completed the
21 work to their satisfaction. I have no idea if they
22 paid him. I have no idea how the two of them
23 interpreted this ten-word description of all of the
24 work that had to be done out there. All I know is
25 my interpretation is Idaho Scapes was hired by

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1 A. What I read from this lease,
2 specifically paragraph 40, is that the landlord
3 must give approval to the exterior characteristics
4 of the building. If in your question you inferred
5 that the landlord also had approval, authorization
6 beyond that, I don't see it written in here.
7 **Q. Well, I may be basing my question on**
8 **information that you have not been given, but I**
9 **don't think there's any question Eckman Mitchell**
10 **wasn't deciding what landscaping to put in the**
11 **parking lot or in the exterior of the building and**
12 **what planters or anything else. Have you seen**
13 **anything to indicate they were?**
14 A. I have not seen anything that would
15 indicate that.
16 **Q. And, usually, and based on your**
17 **experience, the developer, the owner, he decides**
18 **what he wants his development to look like in terms**
19 **of facades and landscaping, do they not;**
20 **contractors don't make those decisions?**
21 A. There are so many variables in the way
22 that construction is delivered, I have to take
23 exception to the word usually. There is no usual
24 in construction delivery.
25 **Q. Okay.**

1 MR. HEPWORTH: This might be example A.
 2 Q. BY MR. WILLIAMS: Now, let's talk
 3 about your affidavit here, which you prepared.
 4 Well, I say you prepared. You have an affidavit
 5 that is dated September 14th. Did you draft --
 6 prepare this yourself or was it prepared by counsel
 7 and then submitted to you for review?
 8 A. It was prepared by counsel and
 9 submitted to me for review.
 10 Q. And did you read through it carefully
 11 at the time you signed it?
 12 A. I love the way he said carefully.
 13 Yes, I did, Brad.
 14 Q. And you agree with -- and I say that
 15 because every word -- it's important that we be
 16 accurate, is it not, in giving testimony?
 17 A. I agree wholeheartedly with that.
 18 Q. And liabilities and responsibilities
 19 can change on the mere definition of a word --
 20 A. Yes.
 21 Q. -- in this case?
 22 A. You are right.
 23 Q. So let's go through and let's --
 24 starting with paragraph 3, it was your
 25 understanding that -- just the second sentence down

1 work. Eckman Mitchell didn't put that valve box
 2 in. Does your understanding differ from that?
 3 A. Ray Patience' deposition on page 19
 4 and 20 said the boxes were in place when we got to
 5 the job.
 6 On page 31 he was asked whose
 7 responsibility is it to coordinate putting stuff in
 8 the sidewalk, and his answer was the day-to-day
 9 superintendent.
 10 Page 42 he said there's a lot of times
 11 that we have meter boxes in the sidewalks that
 12 aren't shown on the drawing.
 13 Q. I guess the main point I'm making is
 14 Eckman Mitchell did not put the green box in,
 15 correct?
 16 A. That is my understanding from the
 17 testimony I've read, yes.
 18 Q. And they didn't determine where the
 19 green box was to be put in. Have you seen anything
 20 to suggest that they did?
 21 A. Yes.
 22 Q. That they determined the location?
 23 A. Question understood better. No. I've
 24 not seen anything that clearly defines that they
 25 said to do it. But, again, I repeat, the question

1 there. You were retained to review facts and
 2 issues surrounding the placement of the irrigation
 3 box in the front sidewalk to the west of the
 4 entrance. What is your understanding, if you have
 5 one, based on everything you've read and seen, of
 6 who decided where to place that green box?
 7 A. In the various depositions that were
 8 taken, that exact question was asked, and I don't
 9 remember anyone giving a clear answer. The
 10 architect said I saw it, and I don't know who said
 11 that it could be placed there.
 12 Q. Let me ask it this way: Do you
 13 remember clearly the testimony of Ray Patience,
 14 Scott Duke, and Glenn Anderson that that was the
 15 developer's scope of work and they put that in and
 16 they decided where to place it? Do you recall that
 17 testimony? And I have it. We can get it out but
 18 I'm trying to save time and avoid the suggestions
 19 that I take four or five hours.
 20 A. No, I don't remember that
 21 specifically. In fact, my notes show it a little
 22 differently than that.
 23 Q. So Ray Patience testified that that
 24 work was done by the developer and they decided to
 25 put in that valve box as part of their scope of

1 was asked numerous times and there are lots of "I
 2 don't remember who told me."
 3 Q. Fair enough.
 4 A. No clear definition.
 5 Q. Let me simplify this. You have not
 6 seen Mr. Pope's deposition yet, it's not available,
 7 but you have seen his affidavit?
 8 A. Yes.
 9 Q. He's the one who said he put in -- he
 10 thought he was putting in that green box because
 11 there was going to be a planter put there, and
 12 that's why he put it in?
 13 A. Yes.
 14 Q. And he hooked it to copper -- one-inch
 15 copper line coming out of the building. He hooked
 16 it to a polyethylene pipe --
 17 A. Yes.
 18 Q. -- and sleeved it. And then he put
 19 that valve box over that connection.
 20 A. Okay.
 21 Q. No dispute about that. And he thought
 22 there was going to be a planter put where he put
 23 the valve box. You're aware of that?
 24 A. Yes. I remember that, his statement
 25 on that.

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1 Q. Now, it turned out he was wrong. No
2 planter was put in the area of that box. We all
3 know that.
4 A. Uh-huh.
5 Q. And no planter was put in at that area
6 at all at that time. That's undisputed.
7 A. Yes. I can't dispute that.
8 Q. Now, I don't know if you've been told
9 or you know why a planter was not put in at that
10 time. Do you know?
11 A. I would have to read back through the
12 depositions, but my memory says that someone
13 testified that the developer, Canyon Park, declined
14 to have it installed.
15 Q. And you've seen those columns out
16 front?
17 A. Yes.
18 Q. Here's kind of a side view, these
19 columns next to the building. It's my
20 understanding, and correct me if I'm wrong, but
21 those columns are in a place where some of the
22 original plans showed a planter but the developer
23 wanted the columns so they couldn't put the planter
24 in and so they weren't -- the planter wasn't put in
25 because it would have interfered with those

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1 columns. Is that your understanding?
2 MR. HEPWORTH: I'm going to object to the
3 form of the question as leading and it's basically
4 testifying.
5 MS. CANNON: And object, evidence not in
6 the record as well.
7 Q. BY MR. WILLIAMS: That's true. I'm
8 leading. And I can lead. It may not be in the
9 record, but I'm trying to simplify it. We can go
10 take some more depositions, but I'm just trying to
11 speed things up so I can get to your ultimate
12 opinions.
13 But if that turns out to be the case,
14 do you have any reason to dispute that?
15 A. You're asking questions about issues
16 that I have no knowledge of.
17 Q. Just assume that's the case --
18 A. I don't even know which direction
19 we're looking in this photograph, nor do I know
20 which columns those are. I can't speculate on
21 that.
22 Q. All right. Now, do you know how far
23 out this green valve box is from the building
24 itself?
25 A. Remember, when I went there, there was

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1 no green valve box.
2 Q. Right.
3 A. So, no, I don't.
4 Q. Ray said it was about 18 to 20 feet
5 out from the building. Any reason to dispute Ray's
6 testimony on that?
7 A. It's reasonable.
8 Q. The planter that's there now with the
9 big elk goes out -- you didn't measure that, I'm
10 assuming?
11 A. I did not.
12 Q. -- about 10, 12 feet. Nowhere
13 near does it come out far enough to encompass that
14 irrigation box had a planter been put there in the
15 first place, right?
16 A. If your numbers are correct and then
17 it adds up mathematically, yes.
18 Q. Okay. Now, back to your affidavit,
19 paragraph 4. Okay. That's the materials you
20 reviewed. I won't go through all of that. But you
21 did look at Sportsman's building plans dated 5-2-03
22 and you looked at building plans dated 5-2-03,
23 pages A0.1 and P2.1, correct --
24 A. Yes.
25 Q. -- in your affidavit?

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1 A. Those are here and then I was provided
2 larger readable copies.
3 Q. By Canyon Park's counsel?
4 A. By counsel, correct.
5 Q. Did you request those specific pages
6 or were those specific -- be enlarged? Did you
7 request those pages be enlarged or did Canyon
8 Park's counsel give you those enlarged pages to
9 have you look at those?
10 A. That was my specific page request.
11 Q. Why did you want to look at those two
12 pages?
13 A. Because those contained or should have
14 contained information that would help me understand
15 the situation.
16 Q. Situation being what?
17 A. The placement of the valve box and
18 directions of the design professional on how and
19 where it should be installed.
20 Q. The design professional being --
21 A. GA Architects.
22 Q. Now, in paragraph 5 -- excuse me just
23 a minute.
24 (A discussion was held off the
25 record.)

1 Q. BY MR. WILLIAMS: Paragraph 5, my
2 analysis and opinions based on your own personal
3 knowledge, education, training -- okay. That's
4 simple enough.
5 Paragraph 6, in projects such as this
6 one involving Sportsman's Warehouse, the contractor
7 is responsible for all work within the contract
8 limits. This phrase refers to the physical
9 boundary within which all work conducted is within
10 the obligation of the contractor unless
11 specifically noted otherwise. Okay? Did I read
12 that --
13 A. You did.
14 Q. You agree that is your opinion in this
15 case?
16 A. Yes, it is.
17 Q. And is that a general industry-wide or
18 accepted opinion or rule, or does that vary? Do
19 people disagree with that?
20 A. No. That's very generally accepted in
21 the industry.
22 Q. Okay. And based on industry standard
23 you're saying?
24 A. Industry standard and industry norms.
25 Q. Industry norms. And how would I -- if

1 I didn't believe you, and I'm not saying I don't,
2 how would I verify that? Where would I go and
3 look, in a book or on the Internet, to help me
4 define what those industry standards or norms are?
5 A. I would go to the AIA document, A-201,
6 which is general conditions of the contract, and
7 you would find a very good definition there.
8 Q. All right. And is that recognized by
9 experts within the industry as embodying what the
10 standard of care is?
11 A. Yes.
12 Q. Standard of the industry?
13 A. Yes.
14 Q. What does it mean when you say the
15 contractor's responsible for work within the
16 contract limits unless specifically noted
17 otherwise? Can you help me describe how it would
18 be specifically noted otherwise, give me an
19 understanding of that.
20 A. It's reasonably common in a facility
21 that has interior finishes or millwork for the
22 owner to contract for that separately. And then on
23 the blueprints, construction documents, drawings
24 and specifications, it would note that everything
25 within the contract limit line was the

1 responsibility of the contractor except for the
2 millwork or specified finishes.
3 Q. What's -- I'm sorry -- millwork?
4 A. Cabinetry.
5 Q. Oh, okay.
6 A. Door trim.
7 Q. That's just an example, I guess, is
8 what --
9 A. That's just an example.
10 Q. Could you give me a few more examples
11 so I make sure I understand the concept.
12 A. On our industrial customers it is
13 fairly common for them to purchase and supply large
14 and complex machinery, especially as it relates to
15 their process, but to require the placement and
16 connection of that machinery to be done by the
17 contractor. And so the construction drawings and
18 documents would note that while this pasteurizer is
19 shown, it will be supplied by the owner.
20 Q. The pasteurizer will be supplied by
21 the owner?
22 A. But connections and placement will be
23 by the contractor.
24 Q. Okay.
25 A. Again, it gets very definitive.

1 Q. Each situation is different. You have
2 to look at what the documents say, I guess?
3 A. Yes.
4 Q. What documents typically would contain
5 these exceptions where it's specifically noted
6 otherwise? Where would you expect to see those?
7 A. The first place that I would expect to
8 see it would be on construction drawings. The
9 second place would be in the individual sections of
10 the specifications booklet.
11 Q. Construction drawings and then the
12 specifications book?
13 A. Yes.
14 Q. What about contracts or exceptions in
15 contracts like on the millwork where an owner has
16 somebody else do the millwork other than the
17 general? That's a written -- specifically noted
18 otherwise? Is that an example?
19 A. Yes.
20 Q. I'm not saying it very well.
21 A. Yes. And I have seen examples of
22 where it is specifically mentioned in the
23 construction contract.
24 Q. Excuse my congestion.
25 Is another way of saying this can a

1 general contractor agree with an owner as to the
2 scope of their duty?

3 A. Let me think through your question.

4 Can an owner agree with the contractor as to the
5 scope of their duties?

6 Q. Yes.

7 A. They'd better.

8 Q. Good. And, for example, in simple
9 terms, a contractor agrees we'll build this office
10 building, but we're not going to design or build
11 any of the landscape or features?

12 A. That is very acceptable. That's
13 reasonable to expect, yes.

14 Q. Okay. Even though landscaping may be
15 within the contract limits, I can agree as
16 contractor with the owner that somebody else is
17 going to do that landscaping?

18 A. Yes.

19 Q. Now, paragraph 7, the second sentence,
20 the agreement between Sportsman's Warehouse and
21 Canyon Park specifically called for Canyon Park to
22 provide a pad-ready site. Oh, so you knew that
23 already. That it would be graded, leveled, and
24 compacted as necessary to commence for
25 construction. I'd forgotten you had already

1 contract would notate that the architect is the
2 representative of the owner. If a discrepancy were
3 noted to the architect and he or she did not act
4 upon it for some reason and the contractor felt
5 strongly enough about it, they then have the right
6 to notify the owner.

7 Q. And we've already looked at -- the
8 owner -- in the contract with Sports Warehouse and
9 Eckman Mitchell, the owner is Sports Warehouse?

10 A. Yes.

11 Q. Eckman Mitchell is the contractor?

12 A. Yes.

13 Q. GA Architects is the representative of
14 the owner, Sports Warehouse --

15 MR. BROWN: I'm going to object.

16 Q. BY MR. WILLIAMS: -- correct?

17 MR. BROWN: That assumes facts not in
18 evidence and the documents speak for themselves.

19 Q. BY MR. WILLIAMS: Well, we just read
20 the document. I don't need to file it out again.
21 You've already testified.

22 A. GA Architects is the contracted
23 architect on this project. Their contract calls
24 for them to be the agent of the owner and testimony
25 says that they acted as agent of the owner.

1 testified to that fact.

2 Once the preparation is complete, the
3 contractor, Eckman, bears the responsibility to
4 notify the proper authority, in this case GA
5 Architects and/or Sportsman's Warehouse, for all
6 construction within the contract limits which is
7 questionable, is not done according to plans, or
8 which does not meet code. And then the area of the
9 front sidewalk where the irrigation box is located
10 in such a place.

11 Now, my question -- first question
12 about that -- those two paragraphs is when you say
13 Eckman has the responsibility to notify the proper
14 authority, GA Architects and/or Sportsman's
15 Warehouse, so when you say and/or, is that an
16 accurate -- you didn't draft this, but you read it
17 and reviewed it?

18 A. It's accurate.

19 Q. It is accurate; you do agree with
20 that?

21 A. Yes.

22 Q. So they could notify GA or Sportsman's
23 Warehouse?

24 A. In proper sequence. Construction
25 documents and the general conditions of the

1 Q. Good. I'm glad we agree on that. So
2 if Eckman Mitchell notices something that's
3 questionable, not done according to plans or does
4 not meet code, they should tell Glenn Anderson
5 about it if they see something like that in the
6 contract limits, correct?

7 A. They should tell his company's
8 representative, yes.

9 Q. Now, if they -- questionable. The
10 word questionable. I guess questionable within the
11 understanding of the contractor, correct? The
12 contractor has to see something that's questionable
13 and understand it, true?

14 A. Yes.

15 Q. Or they have to see something that's
16 not done according to plans, be aware of something
17 not done according to plans, right?

18 A. Yes.

19 Q. And they have to be aware, know
20 something's not up to code to tell the architect,
21 oh, look, this isn't up to code, that ceiling is
22 too low or what have you, right?

23 A. Yes.

24 Q. Now, if someone else does the plumbing
25 or the electrical or the mechanical, we can go

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1 through and -- some subcontractor or some
2 independent contractor of the developer, does the
3 general contractor have to go out and verify
4 everything is done to code?
5 A. No. His observations are based on his
6 knowledge and experience.
7 Q. Okay.
8 A. He is not required to be a code
9 official.
10 Q. Okay. And, obviously, if he sees
11 something he knows through knowledge and experience
12 is not up to code, he's got to tell the architect,
13 right?
14 A. Yes.
15 Q. But he doesn't have to go out and
16 verify all the components of the building or
17 anything else to make sure everything is up to
18 code?
19 A. That's correct.
20 Q. All right.
21 A. Case in point, and an illustration to
22 help you.
23 Q. Yes. Good. Thank you.
24 A. There was a project where an architect
25 designated a certain fastener to attach some upper

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1 cabinets to a wall. It was a fastener that had
2 great tensile strength and no sheer strength, and
3 so when the cabinets were loaded, it would have
4 just sheared the screw off right at the base of it.
5 When we saw -- and it was exactly what was designed
6 by the architect.
7 When we saw what the installer was
8 using, we stopped the work. We called the
9 architect. We talked it over and he said let's do
10 this and this instead. It was what he had called
11 for. Someone who had experience said I don't think
12 that's right. They raised the issue. The
13 proper -- the decision was made at the proper level
14 and the work progressed.
15 Q. Okay. Good example. Thank you.
16 And if an architect designs the
17 building and the structures and the framing and
18 it's got to have sufficient strength to support,
19 he's responsible for that and the contractor goes
20 in and builds it following his specs, right?
21 A. Yes.
22 Q. And if it turns out he didn't design
23 enough support or something, the contractor's
24 following it, that's the architect's
25 responsibility, correct?

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1 A. Yes.
2 Q. Now, in paragraph 8 you indicate your
3 review of the materials revealed no written
4 exceptions to the responsibility of the contractor,
5 Eckman Mitchell, for the front sidewalk area or the
6 irrigation box.
7 And if I understand that sentence,
8 you're saying all this -- well, not all this.
9 Everything you've listed in paragraph 4 -- I won't
10 read it again. You reviewed all that and you
11 didn't see anything within that that showed a
12 written exception or a specific exception for
13 Eckman Mitchell for the sidewalk area where the
14 irrigation box is?
15 A. That's what I said.
16 Q. All right. And you looked at plans
17 and you looked at the contracts. You looked at all
18 of this information and didn't find anything?
19 A. Yes.
20 Q. The type of irrigation -- paragraph 9,
21 the type of irrigation box installed within the
22 front sidewalk area of the Sportsman's Warehouse,
23 hard plastic. Next page, the irrigation box is not
24 designed for or appropriate for usage in a sidewalk
25 area likely to receive heavy foot traffic. Now,

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1 what is your basis for making that statement?
2 A. Experience, having seen this
3 particular type of irrigation box installed in
4 other places and seeing that with traffic of either
5 pedestrians or of lawnmowers or other type of lawn
6 grooming equipment pressing it down into the
7 ground, settling happens. And so my opinion is
8 this is not a good one to put in a sidewalk.
9 Q. So that's based on your actual
10 experience, education, training over these 35
11 years, however long --
12 A. Jeez.
13 Q. Sorry about that.
14 A. Yes.
15 Q. We can say 20.
16 MR. HEPWORTH: I'd be proud of it.
17 MS. CANNON: You were only 10 when you
18 started.
19 THE WITNESS: Thank you.
20 Q. BY MR. WILLIAMS: Well, you obviously
21 have extensive and impressive qualifications and
22 experience more than most people. That is an
23 expert opinion. You know that as an expert, do you
24 not?
25 A. Yes.

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1 Q. Don't be bashful. No need for false
2 modesty. I want to make sure you're qualified to
3 make that opinion.
4 A. Experience has made me an expert, if
5 that's what you're saying.
6 Q. And would you expect an ordinary
7 layperson -- not a lawyer. We're less than
8 knowledgeable about most common sense things -- to
9 know that that box -- just an ordinary layperson
10 building a house, putting in a sprinkler system on
11 their own, to know that that box wouldn't be
12 suitable for use in a sidewalk?
13 A. Someone who's not employed in the
14 construction industry?
15 Q. Just an ordinary layperson.
16 A. Someone who's not employed in the
17 construction industry?
18 Q. Well, we can do both. You think
19 someone employed in the construction industry --
20 A. Would have a much better chance of
21 knowing and understanding that. Someone who works
22 at the bank or any other nonconstruction, probably
23 is not going to know that.
24 Q. What about somebody who's been in the
25 landscape business specifically, should they know,

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1 A. Well, that came to me less than a
2 month ago, but I've had -- the opinion that I've
3 expressed in here, I had for a long time, so I'm
4 not sure what you're asking, but I don't base my
5 opinion on her report, no.
6 Q. No. What I was asking is did you know
7 the manufacturer actually has literature that
8 recommends against the use of that box for a
9 concrete application?
10 A. I did not know that.
11 Q. And she uses the phrase it's strictly
12 warned against, I believe, for use in a concrete
13 sidewalk.
14 A. I have no knowledge of that.
15 Q. She testified that those warnings or
16 instructions are contained in the literature she
17 found at the Web site of the manufacturer, Carson
18 Industries, so you can get that information if you
19 want to.
20 A. If that's a question, I don't
21 understand it. If you're just telling me
22 something --
23 Q. It's a poorly-worded question. But
24 there's no written warnings or labels on the lid
25 itself, but you can --

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1 he or she know that?
2 A. Yes. At all levels down to and maybe
3 excluding the lowest level of laborer. But an
4 experienced laborer, a skilled laborer, and a
5 foreman and a superintendent in the landscaping
6 industry would know that.
7 Q. All right. Now, did you get a copy of
8 the affidavit of Ms. Gill, Joellen Gill, the --
9 A. I did. The efficiency expert?
10 Q. Or human factors expert.
11 A. Yes.
12 Q. She discussed that the green valve box
13 was not suitable for that application in her
14 affidavit?
15 A. Yes.
16 Q. And you concur with her in her
17 opinion?
18 A. I concur with that opinion, yes.
19 Q. And she said she got on their Web site
20 and found literature that suggested that the box
21 was not recommended for use in concrete. And you
22 agree with that?
23 A. Yes, I do.
24 Q. Were you aware of that or did you just
25 agree with it?

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1 A. No.
2 Q. -- get it. You agree with that,
3 there's no --
4 A. It doesn't surprise me.
5 Q. Now, the guy, Mr. Pope, who put that
6 in testified in his affidavit that he thought there
7 was going to be a planter box there and that would
8 be used in a planter, right?
9 A. Yes.
10 Q. It would have been suitable, had it
11 been put in a planter box, true?
12 A. Probably. That's a very broad
13 statement, but probably.
14 Q. He thought that there was going to be
15 a planter box in the location where he put that
16 valve box, and it turns out he was mistaken about
17 that fact, right?
18 A. You're asking me to interpret his
19 understanding.
20 Q. Assuming what he said in his
21 affidavit -- nobody disputes that -- he was of the
22 understanding there was going to be a planter box
23 there, and it turns out there wasn't a planter box?
24 A. That's what he said, and there wasn't.
25 Q. Well, he said in his affidavit he saw

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1 some plans, that that was his understanding, he saw
2 some plans. But yesterday he said he had not been
3 given copies of the actual plans. So he was
4 unclear as to where he got the idea of where the
5 planter box was going to be. I'm just laying some
6 foundation to ask a question.

7 A. Please keep going.

8 Q. Assume that's the case. Does he have
9 any obligation to ask for and look at plans to
10 figure out where the planter box is going to be?

11 A. Yes.

12 Q. Okay. And does the guy -- the owner,
13 the developer who's contracted with him have any
14 obligation to ensure he's putting it where the
15 planter box is going to be?

16 MR. HEPWORTH: I'm going to object to the
17 form of the question. It is misleading in that
18 you're referring -- the way you asked the question,
19 you're suggesting the answer, which is
20 inappropriate.

21 MS. CANNON: I join in that objection.
22 Additionally, I think the contract that we've been
23 referring to is explicitly just for work Mr. Pope
24 was hired to do in the parking lot, not regarding
25 any other work he did up and around and adjacent to

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1 MS. CANNON: I will renew my objection
2 earlier that there is no evidence that the
3 developer was responsible or hired him to install
4 that particular valve box.

5 Q. BY MR. WILLIAMS: That's --

6 A. I would point out --

7 Q. The facts will bear whatever --

8 A. I would point out to you that that
9 valve box is located within the contract limits.
10 The line that delineates the work of the developer
11 and the line that delineates the work of the design
12 professional and the constructor and his
13 subcontractors, that it was placed by a contractor
14 to the developer becomes the issue. In my mind the
15 question is who was involved and what are the
16 implications thereof.

17 Q. Well, you have said that the material
18 is not suitable for that application. Joellen Gill
19 also agrees with that. Mr. Pope says he thinks
20 that irrigation box is suitable, and in his 20, 30
21 years he's never seen a problem with that.

22 A. He's welcome to that opinion.

23 Q. And you just disagree?

24 A. Does he accept this one? He's never
25 seen a problem in 20 --

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1 the Sportsman's Warehouse site.

2 MR. WILLIAMS: Well --

3 MR. HEPWORTH: We know what you want him to
4 say, but you can't -- I don't think you can lead
5 him like that.

6 MR. WILLIAMS: Well, I'll reword the
7 question.

8 Q. BY MR. WILLIAMS: I don't know --
9 Mr. Pope couldn't remember a lot of things, but
10 what he could remember is he had entered this
11 contract. He'd been paid the \$23,000. He'd done
12 all the work and he couldn't remember who he sent
13 the bill to for that green box. That doesn't
14 matter. I'm just saying does Canyon Park have any
15 obligation to ensure that this landscape guy puts
16 valve boxes in the right place?

17 MR. HEPWORTH: I'm going to object to the
18 form of the question. You'd better be more
19 specific. If you're going to talk about valve
20 boxes generally, there's two different areas.
21 There's parking lots and there's --

22 Q. BY MR. WILLIAMS: With regard to this
23 valve box, does the developer have any obligation
24 to make sure he get the plans to show him where the
25 planter box is going to be?

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1 MS. CANNON: Objection. There's not a
2 question on the table.

3 Q. BY MR. WILLIAMS: He came back after
4 the sidewalk was poured and he saw that and saw
5 that it had not been put in a planter box and he
6 testified he was not concerned. He thought it was
7 acceptable and, therefore, he didn't go tell the
8 architect. Do you think he should have?

9 A. That's very difficult. I'm trying to
10 think of it in his shoes. At that point in time
11 his contract is complete and terminated. If I were
12 him and had the opinion that I do that it's not a
13 good place to have it, I would have sent a memo to
14 somebody saying this didn't develop the way I was
15 told it would.

16 Q. Okay. If Mr. Pope had saw something
17 that he thought was questionable, not according to
18 plans or didn't meet code, does he have any
19 obligation to notify the architect or developer?

20 MS. CANNON: May I ask for clarification?
21 When you say something, are you referring to
22 something within his realm of work or just
23 something in general?

24 Q. BY MR. WILLIAMS: No. When this green
25 box he put in, if he came back and saw it wasn't in

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1 a planter and knew that green box was either
2 questionable, not according to plans or didn't meet
3 code or industry standard, should he at that point
4 have notified the architect, as you say?

5 A. He should not have notified the
6 architect because he has no contractual
7 relationship with him, but he should have notified
8 the developer.

9 Q. Who he has a contract with?

10 A. Who he has a contract with.

11 Q. Okay.

12 A. If he shared my opinion that it was
13 improper.

14 Q. Well, he testified he didn't, and
15 whether or not he really believes that or -- he
16 said it and we'll --

17 A. I trust him.

18 Q. That's an issue I guess a jury may
19 have to resolve. But let me go through and finish
20 your affidavit.

21 So he selected the material. He
22 designed that material and selected that box --
23 there's no dispute about that -- under the mistaken
24 impression it would go in a planter box. We all
25 agree on that?

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1 irrigation box more well suited for a sidewalk.

2 And no question there. That kind of
3 reiterates what you're saying in paragraph 7, if
4 you see something questionable, not done according
5 to plans, tell -- what should have happened -- if
6 the architect had been told in this case, what do
7 you think should have happened at that point?

8 MR. BROWN: Objection. Calls for
9 speculation.

10 Q. BY MR. WILLIAMS: I just want an
11 expert opinion.

12 A. In a process in order to avoid
13 problems -- to have avoided this problem, if the
14 architect had been notified, he should have talked
15 to the developer who was responsible for it. There
16 should have been clear communication among the
17 parties and a resolution arrived at, not by
18 default, but by decision.

19 Q. And then at that point if he
20 doesn't -- well, that's a bad question. Let me see
21 what I'm trying to say. Scratch that.

22 Let me go back to your concept of the
23 written exception unless specifically noted
24 otherwise. You would expect to see that either in
25 plans, the specs, contract documents. Did you look

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1 A. That's only an assumption on my part.

2 Q. And he put it there under the
3 assumption that that's where the planter box was
4 going to be. It turns out to be mistaken, but we
5 don't know who led him to that mistaken assumption,
6 correct?

7 A. His affidavit --

8 MS. CANNON: I think -- objection. That's
9 been asked and answered. He's already indicated he
10 does not know. You can go ahead and answer, if you
11 can.

12 Q. BY MR. WILLIAMS: His affidavit said
13 he looked at some plans?

14 A. It says he was asked to install a
15 valve box. It does not say who asked him. He
16 said, we understood it would be located in this
17 position, but he doesn't identify any source.

18 Q. Paragraph 10 states, of your
19 affidavit, as the party responsible for
20 notification, if work done within the contract
21 limits is questionable, not done according to plans
22 or which does not meet code, the contractor, Eckman
23 Mitchell, should have recognized the choice of that
24 particular irrigation box as being inappropriate
25 and seen to it that it was replaced with an

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1 at the plans in this case? You did look at two
2 pages that were blown up. Is that what you were
3 looking for, to see if there was some exception
4 that Eckman Mitchell was not responsible for this
5 green valve box? Were you looking for that?

6 A. I was looking for detailed
7 instructions on what to install there and how to
8 install it. I was looking for detailed
9 instructions on the connection that needed to be
10 made and any specific valves that needed to be
11 installed, and I was looking for any exception that
12 would exempt Eckman Mitchell and GA Architects from
13 the responsibility of that installation.

14 Q. You didn't find any specific
15 exceptions, written exceptions, exempting Eckman
16 Mitchell for responsibility for this green valve
17 box, either the materials or the location?

18 A. No.

19 Q. I forgot to ask you, but let me just
20 get some other terms. What would typically happen
21 in terms of the development of this project in
22 terms of plans that are developed? And you may not
23 know in this case, but let me get a general
24 understanding of what happens -- I think what
25 happened -- and is this consistent -- is the

1 developer has a development and they get a lease
2 with Sportsman's -- for Sportsman's to lease a
3 space, right?
4 A. Yes.
5 Q. And then some drawings are sent to
6 Mr. Anderson, some preliminary drawings. Okay?
7 Here's a pad or a development site. Put a building
8 on there, Mr. Anderson, and show us what it looks
9 like. Is that --
10 A. Yes.
11 Q. -- extremely crude, simplistic
12 terminology, but that's how I think, and I'm trying
13 to get a handle on it.
14 And then Mr. Anderson puts down a
15 building on these plans that are prepared by EHM
16 Engineers. Now, you probably know Gerald Martens
17 here?
18 A. Yes.
19 Q. He's the dad of my partner, Tara
20 Martens.
21 A. Oh, that's right.
22 Q. Highly respected contractor in this
23 area.
24 A. Engineer.
25 Q. Engineer. I beg your pardon. He did

1 those initial -- what are they called -- site
2 drawings?
3 A. Yes.
4 Q. Glenn Anderson gets those and puts
5 what Glenn -- either he told me a prototype
6 building on those drawings and then they send it
7 out to the various people involved to review it.
8 MR. BROWN: I'm going to object. I'm just
9 a little unclear whether you're talking about a
10 hypothetical or speculation, because you keep
11 referring back to specific individuals within the
12 case as if it's going to require testimony on this.
13 MR. WILLIAMS: I'm talking about this is my
14 understanding. If you have any reason to dispute
15 that -- I don't think there's any controversy about
16 that or dispute, but I'm trying to lay the
17 foundation and ask some questions.
18 Q. BY MR. WILLIAMS: But, anyway, I don't
19 know if that's in the record, but I don't think
20 there's any dispute about that, and that sounds
21 like how this thing would work, based on your
22 experience?
23 A. Yeah. There is communication between
24 the lessor, the lessee, and/or developer, in this
25 case, and the design professionals.

1 Q. Now, help me with some terminology.
2 There's multiple sets of plans from the very
3 beginning. And is the initial one called, what,
4 like a coordination set?
5 A. Conceptual --
6 Q. Conceptual?
7 A. -- typically.
8 Q. And then is there a permit set, as I
9 understand it?
10 A. There is.
11 Q. And then a bid set?
12 A. Which should be the same as the permit
13 set.
14 Q. And bid meaning it goes out for people
15 to bid on --
16 A. For competitive or confirming bids,
17 whatever the case may be.
18 Q. Then a construction set?
19 A. Which should, again, be the same as
20 the bidding set.
21 Q. Okay. And then as-builts?
22 A. Which are supposed to show what was
23 truly put in place if there were any changes made
24 from the design.
25 Q. And do you know in this case -- well,

1 who, in any case, typically, puts those various
2 plans together?
3 A. There is no typical.
4 Q. Okay. Do you know in this case who
5 did the permit, did the construction as-builts?
6 A. I don't know.
7 Q. If Glenn Anderson testified he did
8 those, any reason to dispute that?
9 A. No.
10 Q. You would expect that?
11 A. I would.
12 Q. Now, I think he testified -- I'm
13 pretty sure. We can pull it out -- that he took
14 a -- he's designed, did the architecture for all of
15 the Sportsman's Warehouse buildings that have been
16 built, of which I think there are 75, and they use
17 two basic models. Do you recall that testimony?
18 A. Similar to that. I don't recall the
19 two basic models, but whatever.
20 Q. He gets the plans from Gerald Martens,
21 EHM. He puts a prototype down and then they send
22 it out for review, is this okay. I think he used a
23 store from Portland or Clackamas or something that
24 initially showed some planters on it. Did you
25 recall that portion of his deposition?

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1 A. Yes. But here's where I have
2 difficulty with that. You say that he received the
3 site drawings from EHM and he overlaid one of their
4 typical models on it. I don't see any evidence
5 that he overlaid that or tied it in any way to
6 EHM's plans. Page A-01 shows the building facing
7 east towards Palmer Street and abutting a Mullan
8 Road, but I can't find that right now, none of
9 which I could find in Twin Falls. Somebody's
10 apparently moved the canyon. So that's where I
11 begin to hesitate there.
12 Q. Well, I think there's testimony in his
13 deposition some of the initial plans had some
14 planters on them and then at some point a decision
15 was made not to put planters in?
16 A. If that was testimony, I have no
17 reason to dispute it because I have no knowledge of
18 it.
19 Q. Now, when Eckman Mitchell entered
20 their agreement with Sportsman's, their
21 understanding was that they were not going to build
22 any planters. Were you aware of that?
23 MS. CANNON: Calls for speculation.
24 Q. BY MR. WILLIAMS: I'm asking him did
25 you see that in your materials or anything you've

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1 is.
2 A. What paragraph does that come from, so
3 I know what we're supposed to be looking at of B-1?
4 I just wondered what was referred to in the
5 document.
6 Q. Well, I think I referred to who the
7 parties are, who's responsible for what.
8 A. We'll look later then.
9 Q. But at least on Exhibit B-1, the
10 drawing, that -- it's kind of -- you can see the
11 columns there. There's no planters out in the
12 middle of that sidewalk.
13 A. That contoured shape that I described
14 earlier does not exist on this drawing, no.
15 Q. Okay. And two pages -- now, I believe
16 the testimony is, and I could be wrong. This may
17 be something that isn't in the record that I've
18 just been told, but by the time Eckman Mitchell's
19 hired and they get the plans from Glenn, there are
20 not planters shown on that. Any reason to dispute
21 that?
22 A. Because I have no knowledge of it, no,
23 no reason to dispute it.
24 Q. Okay. So they think they're building
25 a building that doesn't have any planters in it.

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1 been provided?
2 A. I don't remember. Let me look.
3 Thankfully, this is not a memory test.
4 Q. I can help you. Let me show you the
5 lease that we talked about. I'll get you a big
6 page here and I'll let you look at that.
7 MS. CANNON: And when we do get to a place
8 where we can take a break, I'd appreciate it.
9 THE WITNESS: On EHM's drawing, C-2, they
10 show some contoured shapes, both to the east and
11 west of the main entrance, with a different surface
12 texture than the sidewalk surrounding it. That
13 could be realistically be construed to be planters,
14 although they are not designated as such. Same on
15 C-1. On A-01 we see the same shapes and it talks
16 about bicycle racks, but no planters. No planter
17 is shown in it.
18 Q. BY MR. WILLIAMS: Let me -- I think we
19 can speed this up. The lease that we talked about
20 has some attachments, the lease --
21 A. I think that's my copy. Did you get
22 it from here?
23 Q. I might have. This lease, attachment
24 B-1, this was provided to Sportsman's Warehouse.
25 They know what the agreement between these folks

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1 And I think I can show you what they were looking
2 at. Will you look at this.
3 MR. WILLIAMS: Let's take a break now.
4 (A recess was taken from 10:09 a.m. to
5 10:15 a.m.)
6 Q. BY MR. WILLIAMS: Mr. Arrington, I'm
7 just going to show you -- is this the same A-1 that
8 you referred to in your -- you had a blow-up, I
9 think. Your attorney said you blew up --
10 A. No. It doesn't appear to be.
11 Q. -- A-0.1.
12 A. Yes. Mine says A-0.1, and this one is
13 just A-1.
14 Q. Okay. Well, I'm not sure what you're
15 looking at, but for purposes of my question I'll
16 represent Eckman Mitchell was going off this when
17 they built this building. And can you orient
18 yourself here? Do you recognize that this is the
19 front of the store here. This is the entry. These
20 here -- I'm speeding this up. These two big
21 columns, do you see these two big columns?
22 A. I do see them.
23 Q. Those are the two big columns. Do you
24 see the three concrete planters in front of the
25 columns there?

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1 A. Yes.
2 Q. You know when were at the store the
3 other -- or in all the times you've been there,
4 you've seen these three big concrete planter boxes
5 right in front of the entryway?
6 A. I couldn't describe them right now if
7 I had to, but I know that I've seen some greenery
8 there.
9 Q. They're built up. They're nice
10 concrete planters. Mr. Pope did the irrigation for
11 those as well.
12 Now, on these -- I'm trying to orient
13 you. Do you see these two columns?
14 A. Yes.
15 Q. You've seen those columns in your
16 personal inspection. They're in photographs too,
17 right?
18 A. Yes.
19 Q. There's no planters on this set?
20 A. There are none indicated.
21 Q. There are none indicated. And this is
22 consistent with the lease, Exhibit B-1, which
23 Eckman Mitchell is working off of these things and
24 they're not putting in any planters. You don't see
25 any there now?

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1 A. Not in that location, no.
2 Q. Let me make sure I get the right one.
3 P-23. Now, is this the other one that you looked
4 at in your affidavit, Mr. Arrington, blown up?
5 P-21? Oh, that's P-23. Doesn't matter. This is
6 -- oh, maybe it does matter. Do you have P-21
7 then?
8 A. Yes, I do.
9 Q. Do you have the big one?
10 A. Yes.
11 Q. Why don't you bring that. I'll see if
12 I can find mine. Whoever can get to it first.
13 A. We're not going for a race.
14 Q. You've got it. Let's make sure mine
15 is the same as yours. Okay?
16 A. Does it in the lower right-hand corner
17 in vertical print say bid set, May 2, 2003? It
18 does not.
19 Q. P-21, as-built.
20 A. These are not the same drawings.
21 Q. All right. Well, let's look at them
22 both, but for purposes of my questions these are
23 the as-built sets. CCI Mechanical, do you know
24 what their involvement was in this case?
25 A. Someone's deposition identified them

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1 as a design-build mechanical contractor. That's
2 all I know.
3 Q. They're a subcontractor of Eckman
4 Mitchell. They do the mechanical and plumbing.
5 Okay. So this set's prepared by them, given to
6 Glenn Anderson, who puts together the as-built.
7 They actually do show the ghost of a planter box.
8 Do you see right there in front of the entryway.
9 There's actually two.
10 A. I see a contour shape that we assume
11 to be that, yes.
12 Q. Well, we don't know. I'm just telling
13 you this CCI does all the mechanical for all the
14 Sportsman's Warehouses.
15 MR. BROWN: Object to the form.
16 Q. BY MR. WILLIAMS: I can put that in
17 later, but, apparently, somehow this got out that
18 showed a planter from one set of drawings that
19 didn't end up getting put in.
20 Now, you see right here, two and a
21 half-inch domestic cold waterline?
22 A. Yes.
23 Q. That's a waterline that's water coming
24 out of the store. Now, what is this --
25 A. No. That's incorrect.

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1 Q. Okay. You tell me, what's that for?
2 A. That's bringing water in to supply the
3 store.
4 Q. Oh, okay.
5 A. Restrooms, sinks, and other domestic
6 needs --
7 Q. Right.
8 A. -- within the building.
9 Q. That's what that meter box is, right?
10 A. Probably.
11 Q. Mr. Pope testified that there was
12 water going in but he thought there was a copper
13 tube also coming out that he's supposed to connect
14 up his plastic pipe.
15 A. Well, there's another line indicated
16 that it's a one-inch irrigation line to planters.
17 Q. To planters.
18 A. And any valves, vacuum break, or
19 siphon shutoff, et cetera.
20 Q. So that's what he apparently thought
21 at one point he was going to do that, put in that
22 one-inch line and connect it to the copper line?
23 A. No. He probably thought that he would
24 connect to that. You'll remember that the plumbing
25 subcontract called two stub lines five feet outside

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1 the building.

2 **Q. That's not my point. I'm just saying**
3 **this is what he thought he was doing is --**

4 MS. CANNON: Who is he?

5 **Q. BY MR. WILLIAMS: Mr. Pope.**

6 A. Mr. Pope should have assumed that he
7 would connect to that one-inch line stubbed out of
8 the building.

9 **Q. And I think that's what he said. So**
10 **let's read this though. One-inch irrigation line**
11 **to planters, so they think they're going to put in**
12 **planters.**

13 MR. BROWN: I'm going to object. It
14 doesn't identify what planters are being referred
15 to there. We have planters in the front of the
16 building that still remain and were there at the
17 time of this construction.

18 **Q. BY MR. WILLIAMS: Well, let me lay a**
19 **little more foundation. Can you now see this is**
20 **the entryway. These are the columns that we've**
21 **looked at on P --**

22 A. Yes.

23 **Q. Okay. You're oriented?**

24 A. Yes.

25 **Q. Somebody made a mistake yesterday.**

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1 I know is that this one-inch irrigation line coming
2 out is going to supply water to planters.

3 MR. WILLIAMS: Okay. That's fair.

4 MR. HEPWORTH: I want to make the
5 objection.

6 MR. WILLIAMS: I'll withdraw the question.

7 MR. HEPWORTH: I just have a hard time with
8 the manner in which you ask some of your questions.
9 You're asking him to read Blaine Pope's mind. Now,
10 if you want to ask him questions about the plans,
11 great. If you want to ask him about his review of
12 other documents, great, but you've been doing
13 this -- you know, you've been testifying quite a
14 lot and then asking questions like that, and just
15 that form of question, you know, is objectionable.

16 MS. CANNON: Join.

17 **Q. BY MR. WILLIAMS: What I'm trying to**
18 **do is you haven't read his deposition because it**
19 **was taken yesterday. So I'm trying to avoid having**
20 **to wait for our court reporter to prepare a**
21 **transcript, get it, come back and depose you again,**
22 **and save us all some money. So he's right. I am**
23 **putting stuff in, but my question is --**

24 A. That places a liability on me that I'm
25 not comfortable with.

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1 Mr. Pope looked at these and thought that north was
2 south and south was north.

3 A. It would be because the compass row
4 says that's what it is.

5 **Q. That's true, but we know the loading**
6 **docks -- this is the back.**

7 A. But that aside, we recognize that as
8 the entry to the store.

9 **Q. Fair enough. And somebody -- initial**
10 **set, there are going to be planters here. Later**
11 **they were taken out, but Pope thought he was**
12 **supposed to hook up this one-inch irrigation line**
13 **to the planters. That's what he thought he was**
14 **doing.**

15 MR. BROWN: I'm going to object. I think
16 that misstates his testimony.

17 THE WITNESS: You're putting suppositions
18 on my part. There are some lines ghosted in here
19 that you are identifying as planters and I am
20 agreeing that that is a reasonable representation,
21 but there is no designation. Therefore, I don't
22 know. You're saying that this line goes to
23 planters and you're inferring that it means to
24 those planters, telling me that that's how Mr. Pope
25 understands it. I have no knowledge of that. All

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1 **Q. Fair enough. You don't need to**
2 **assume. I just want you to read this sentence.**
3 **One-inch irrigation line to planters.**

4 A. Yes.

5 **Q. Field verify location, what does that**
6 **mean?**

7 A. That means that this pipe, the
8 one-inch plastic -- or just one-inch irrigation
9 line coming out of the building could be at that
10 exact location or it could be moved this way or
11 this way. It could be 10 feet out. It could be 5
12 feet out. They're not positive that that's -- that
13 it will be exactly where it's shown.

14 **Q. Who's the field verifying the**
15 **location? What does that mean?**

16 A. Whoever needs to have any action
17 connected to that line.

18 **Q. Who is supposed to verify it is what**
19 **I'm asking?**

20 A. Whoever has -- for instance, if
21 someone were going to do some excavation in that
22 area, they would need to verify for location and
23 the depth of that pipe so that they don't hit it
24 and break it.

25 **Q. Okay.**

1 A. If someone's going to connect to that
2 pipe, they would need to verify where it is so they
3 would know where to dig to connect to it. If
4 someone were going to place a statue there or an
5 addition to the building or anything, that's what
6 I'm saying. It can apply to a number of people.
7 Q. And any shutoff valves, vacuum
8 breakers, check valves, back-flow preventers, et
9 cetera, designed and installed by others --
10 A. Yes.
11 Q. -- what does that mean?
12 A. That means that state and city
13 plumbing and health codes will probably require a
14 separation of domestic water and irrigation water,
15 and that whatever the city requires will be the
16 responsibility of whoever hooks onto that
17 irrigation line.
18 Q. Okay. This valve box for these
19 planters are designed and installed by others,
20 correct, Mr. Arrington?
21 A. No.
22 Q. It's talking about an irrigation line
23 to planters, valve --
24 A. Where did you find the word box in
25 there?

1 Q. -- back-flow preventers. That's a
2 shorthand -- that's what it's talking about, any
3 kind of valve box irrigation planters there are
4 designed and installed by others.
5 A. I can't agree to the term box. He
6 says specifically valves, comma, back-flow
7 preventers --
8 Q. Right.
9 A. -- anti-siphon valves, comma. He
10 doesn't mention it, and so to infer is simply your
11 interpretation of it. I don't agree.
12 Q. Well, okay. We can disagree about
13 whether those terms -- but, clearly, this
14 irrigation line for these planters is the work of
15 someone designed and installed by others. It's not
16 being designed and installed by Eckman Mitchell.
17 It's being done by others. Correct?
18 A. Make sure I understand the wording of
19 your question.
20 Q. Somebody else is doing this work?
21 A. Valves -- well, shutoff valves, vacuum
22 breakers, check valves, back-flow preventers will
23 be designed and installed by others.
24 Q. And that pipe that was connected in by
25 Mr. Pope, he's the one putting in the one-inch pipe

1 for the planter designed and installed by him.
2 Someone other than -- it wasn't Eckman Mitchell
3 that was designing or installing.
4 A. What CCI is saying here, my
5 interpretation, is that we're going to stick a
6 one-inch pipe out of the building and it's for your
7 irrigation. Where you take it from there is your
8 responsibility.
9 Q. That is a written language, right?
10 A. Yes.
11 Q. And it's an exception -- it is
12 excepting Eckman Mitchell from -- that's somebody
13 else's work?
14 A. From extending that line.
15 Q. Putting in that one-inch irrigation
16 planter or anything else with that box?
17 A. I think my interpretation has been
18 pretty clearly stated.
19 Q. Okay. Does that not constitute a
20 written exception to Eckman Mitchell's job within
21 the contract limit lines?
22 MS. CANNON: Objection. This was not
23 written by Eckman Mitchell; it was written by CCI
24 Mechanical.
25 MR. HEPWORTH: And I'm going to object.

1 Those are as-built plans, not the building plans.
2 THE WITNESS: Your terminology, yes, that
3 is an exception, but I agree with Jeff.
4 Q. BY MR. WILLIAMS: Now, where's my
5 contract?
6 A. Do you want this out of the way?
7 Q. Yeah. I'm looking for my Exhibit
8 *-001, the contract from Sportsman's. That's
9 yours.
10 A. No. There's yours. Do you want me to
11 keep this?
12 Q. Yes. I'm about done. I just want to
13 find that contract.
14 AIA document A101, which you're
15 familiar with in general and in this case, correct?
16 A. Yes.
17 Q. Now, in this contract it says right
18 here, AIA document A201-1997, general conditions of
19 the contract for construction is adopted in this
20 document by reference. Do not use with other
21 general conditions unless this document is
22 modified.
23 Are you familiar with that language
24 from your experience?
25 A. Yes.

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1 Q. This contract incorporates the general
2 conditions promulgated by the AIA, correct?
3 A. Correct.
4 Q. Okay. And this is AIA document
5 A201-1997. That's referred to in this contract --
6 A. Yes.
7 Q. -- incorporating that?
8 You've seen these before, haven't you?
9 A. I have.
10 MR. WILLIAMS: I have copies for all of you
11 guys.
12 (Exhibit *-002 marked.)
13 Q. BY MR. WILLIAMS: Let's turn to
14 article 3, contractor.
15 A. 3 point what?
16 Q. We'll start with article 3 on page 12
17 and then we'll go down to 3.22. Actually, start
18 with 3 point -- let's make a clear record. I'm
19 trying to go quickly to get you to your
20 appointment, but let me slow down so I don't do
21 this too sloppily.
22 For the record, Exhibit *-002 is AIA
23 document A201-1997. That is incorporated into the
24 contract between Sportsman's and Eckman Mitchell.
25 Article 3 of that contract or the contractor --

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1 Q. But it is recognized that the
2 contractor's review is made in the contractor's
3 capacity as a contractor and not as a licensed
4 design professional unless otherwise specifically
5 provided in the contract documents, correct?
6 A. Yes.
7 Q. Okay. What does that tell you,
8 Mr. Arrington?
9 A. Your question earlier about do I
10 expect a building contractor to interpret code and
11 my answer was no, but I expect him to report what
12 he knows based on experience and knowledge.
13 Q. Right.
14 A. And this, I think -- this is the
15 language that says it. The architect is
16 designed -- or is designated as the design
17 professional.
18 Q. Right.
19 A. But the contractor is a resource, a
20 reporting resource.
21 Q. Right. And so if the contractor,
22 Eckman Mitchell, sees something in the field they
23 know is questionable, not up to code or not
24 consistent, their duty is to report it to the
25 architect?

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1 conditions relative to the contractor, Eckman
2 Mitchell, 3.2, in bold, is a review of contract
3 documents and field conditions by contractor.
4 You know what that is?
5 A. I think so, yes.
6 MR. HEPWORTH: Brad, is this the contract
7 between Eckman Mitchell and Sportsman's Warehouse?
8 MR. WILLIAMS: Yes.
9 MR. HEPWORTH: Thanks. Sorry.
10 Q. BY MR. WILLIAMS: So what you're
11 talking about in your affidavit, you see things in
12 the field that are questionable, not according to
13 plans, not up to code?
14 A. Yes.
15 Q. This is saying what Eckman Mitchell
16 and 3.22, any design errors or omissions noted by
17 the contractor doing this review shall be reported
18 promptly to the architect.
19 A. That's what you said.
20 Q. So were you basing your opinion on
21 that or did you just know that from all your
22 experience?
23 A. That would be experience based.
24 Q. All right. And you agree with that?
25 A. Yes.

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1 A. That's correct.
2 Q. But they're not the design
3 professional?
4 A. No, they're not.
5 Q. They're not the one who designed the
6 landscaping or the components of the landscape
7 system and they're not responsible for it --
8 A. They didn't design --
9 Q. -- isn't that true?
10 A. They didn't design anything.
11 Q. And they have specifically contracted
12 away any duty to design -- they're not responsible
13 for the design of this landscape system or this
14 irrigation box?
15 MS. CANNON: Calls for a legal conclusion.
16 Q. BY MR. WILLIAMS: Isn't that true,
17 Mr. Arrington?
18 A. They have contracted away their
19 ultimate -- the ultimate responsibility for design.
20 That is my understanding.
21 Q. And so they didn't choose that green
22 box and Scott Duke when he put in that concrete had
23 no duty to design that or be responsible for
24 choosing whether that was suitable for that
25 application; isn't that true, under this very

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1 language?
2 A. No.
3 Q. Come on, Mr. Arrington, please.
4 A. You used the term --
5 Q. That's exactly what it says, they
6 didn't design -- they're not responsible for the
7 design of that system, true?
8 A. If you'll keep your question the same
9 as your interpretation, then I can answer yes.
10 Q. Okay. I just want a fair and candid
11 answer.
12 MR. HEPWORTH: I'm going to object to that.
13 You're getting argumentative.
14 MR. WILLIAMS: All right. I am.
15 MR. HEPWORTH: I don't think that's
16 appropriate.
17 MR. WILLIAMS: Withdraw it. I apologize.
18 MR. HEPWORTH: He's trying to be fair.
19 Q. BY MR. WILLIAMS: Tell me why -- are
20 you saying Eckman Mitchell is responsible for the
21 design of this box and this sprinkler system?
22 A. Eckman Mitchell was not responsible to
23 specify that that box is to be used. Eckman
24 Mitchell is responsible or Scott -- help me with
25 that.

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1 Q. Scott Duke --
2 A. Scott Duke --
3 Q. -- the concrete foreman.
4 A. -- is responsible to report to those
5 in authority his opinion that that box is not a
6 proper application there. But if you say,
7 therefore, he has no responsibility, that's where I
8 fall off.
9 Q. Are you saying Scott Duke should have
10 known that green valve box, which he didn't design,
11 didn't pick, didn't choose the materials, he should
12 have known that green valve box wasn't suitable?
13 Is that based on this contract language?
14 A. I'm saying that he should have either
15 known it or at least strongly suspected it, based
16 on his position and experience in the industry.
17 Q. But that's not what -- this defines
18 their duties, this contract?
19 A. This defines ultimate responsibility.
20 But what I have talked about is how we get to this.
21 Is Eckman Mitchell ultimately responsible for the
22 design and specification of that box? They are
23 not. The contract says that they are not.
24 Q. Okay.
25 A. Are they and their employees

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1 responsible to report to someone in authority items
2 that are incorrectly specified or installed, yes,
3 they are.
4 Q. Well, my question was is Eckman
5 responsible for designing that system, which
6 includes choosing that particular box?
7 A. That answer is yes.
8 Q. And if that --
9 A. No. Wait a minute. Stop. Is Eckman
10 Mitchell responsible for designing that? I'm
11 sorry. I went off a different direction. They are
12 not responsible for designing that box. My
13 apologies.
14 Q. You remember when I asked you this
15 morning a whole series of examples, if an architect
16 builds something, the contractor comes in and
17 builds it, he may not know it's not up to code. He
18 didn't design it. The architect did or the
19 millwork. It's not their responsibility to
20 determine if various materials meet code or it's
21 not their responsibility, they didn't design it is
22 what I was saying.
23 A. No. But it is their responsibility to
24 apply common sense to what they see.
25 Q. Sure.

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1 A. And I'm saying that Scott Duke or
2 anyone else in the position in which he held would
3 by common sense and experience look at that and
4 should reasonably have been expected to say, I
5 don't think that's right.
6 Q. If they do know something -- leave
7 aside the question of whether Scott should have
8 known that is a suitable material. It's clear it's
9 not in a planter. It's clear to everyone, right?
10 When this concrete's laid, there's no planter
11 there. Everyone can see that?
12 A. Correct.
13 Q. Then we've looked at these plans, I
14 guess -- well, strike that.
15 It's not according to plans. That's
16 obvious, right?
17 MR. HEPWORTH: Object to the form of the
18 question.
19 MS. CANNON: What are you referring to?
20 Q. BY MR. WILLIAMS: Well, let me
21 simplify. Eckman Mitchell did not think they were
22 putting in planters. Mr. Pope, apparently, thought
23 they did -- there was going to be a planter box
24 there, and there wasn't. Okay?
25 A. Yes. There is not a planter box

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1 there. What everybody else thought, I don't know.
 2 Q. So irrespective of the quality or
 3 suitability of the material, that should have been
 4 pointed out to the architect, hey, this is not on
 5 the plans. What's this doing here, right?
 6 A. Yes.
 7 Q. And so what is Eckman Mitchell's duty,
 8 to notify the architect?
 9 A. Yes.
 10 Q. And at that point they've discharged
 11 their duty?
 12 A. Yes.
 13 Q. Okay. Did you read Glenn Anderson's
 14 deposition completely?
 15 A. Yes, I did.
 16 Q. Do you recall his testimony that he
 17 saw that and said, hey, this isn't on the plans.
 18 What's going on? And then he talked to the
 19 developer and asked him why is this there?
 20 MS. CANNON: Objection.
 21 Mischaracterization of what he actually said.
 22 Q. BY MR. WILLIAMS: I'm paraphrasing,
 23 but didn't he say he was aware of this and he was
 24 aware it's not in the plans?
 25 MR. BROWN: I join the prior objection,

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1 misstating prior testimony.
 2 Q. BY MR. WILLIAMS: Before you do --
 3 MR. HEPWORTH: Let him do what he wanted to
 4 do. You ask the question. Let him answer.
 5 Q. BY MR. WILLIAMS: I asked, did you
 6 read the deposition? Mr. Arrington, can you answer
 7 that question, please.
 8 A. Yes.
 9 Q. Okay. Now I'm asking your memory and
 10 understanding. Didn't Glenn say he was aware that
 11 that box was there and there's no planter there?
 12 MS. CANNON: So you're not going to allow
 13 him to refer to the deposition?
 14 MR. WILLIAMS: I am.
 15 THE WITNESS: I remember that he mentioned
 16 it in his deposition. I don't remember the
 17 specific words he used.
 18 Q. BY MR. WILLIAMS: Okay. Let's go to
 19 the deposition then. Which page are you on?
 20 A. 22 is where that discussion begins, at
 21 the bottom of 22.
 22 Q. Okay.
 23 A. Do you specify the make, model of the
 24 box?
 25 Q. Which line are you on?

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1 A. Now I'm up to 23, 2, line 2.
 2 Q. 23?
 3 A. Yeah. Page 23, line 2.
 4 Q. Okay.
 5 A. In that he says that they were being
 6 installed when he was on site.
 7 Q. Where are you reading?
 8 A. Now I'm down to line 19 on page 23.
 9 I was on site when they were being
 10 installed. The developer's people installing them
 11 -- I'm skipping words occasionally. I didn't pay
 12 too much attention to what was going on with it
 13 other than -- it appears at this point that he's
 14 asking himself a question -- why are we putting
 15 those at this location. And he answers his own
 16 question. Okay. All right. Now I'm on 24,
 17 line 1. That was the recollection. I know that
 18 somebody had to pour concrete back to it.
 19 Q. Are you thinking of a different
 20 location or is that the one you're basing your
 21 memory on?
 22 A. That's the one that I'm basing my
 23 memory on.
 24 Q. Let me show you. It comes up in, I
 25 think, two or three places. Let's start at page

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1 15.
 2 MS. CANNON: I'm sorry. What page?
 3 MR. WILLIAMS: 15.
 4 Q. BY MR. WILLIAMS: There's a question
 5 Mr. Hepworth asked, line 10, to Glenn, do you have
 6 an independent recollection of what we've been
 7 calling the irrigation boxes in the front sidewalk
 8 of Sportsman's Warehouse?
 9 That leads into a long answer going
 10 down to line 21, 22.
 11 As I recall, the developer was
 12 required to bring irrigation water to the front of
 13 the building. The developer being Canyon Park.
 14 That was for a planter that was supposed to have
 15 gone in the front. Okay? Seems somebody thought
 16 there was a planter going to be there. The
 17 developer didn't want that to be installed. And
 18 part of that was for the water service to the
 19 building along with the meter box, if I'm correct.
 20 One of those boxes was a meter box. Those items
 21 were installed, but the developer didn't want the
 22 irrigation box or the planter installed, so it was
 23 left for future connection, should they ever change
 24 their mind.
 25 So Mr. Anderson knew that was there

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1 and the developer, he testified, wanted it left
2 should the developer change their mind and put in a
3 planter at some future date.

4 MR. HEPWORTH: I'm going to object to the
5 form of the question. I think you're putting in
6 parties where they don't belong. I didn't
7 understand it that way, I guess. I'm objecting to
8 your question because I think it mischaracterizes
9 the quote, and the quote speaks for itself.

10 Q. BY MR. WILLIAMS: Isn't that what he's
11 saying? Don't you understand -- he was aware of
12 it. He talked to the developer. The developer
13 says, well, if we change our mind, leave it there.

14 MS. CANNON: Objection to the form of the
15 question. If you can answer it, do it.

16 MR. HEPWORTH: Objection to the form.

17 THE WITNESS: I think you're adding
18 specifics to a general statement and so I can't
19 agree with your interpretation of it.

20 Q. BY MR. WILLIAMS: Which part don't you
21 agree with?

22 A. You're trying to add specificity to
23 the location, the exact location of the box, not
24 just its existence.

25 Q. What Glenn testified to is he was

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1 Q. All right. I think he talks about it
2 again. Hang on. You recall him testifying that --
3 on page 22 that the developer's people were
4 installing the boxes. He did testify to that.

5 A. Yes.

6 Q. And then -- let's see, I think it was
7 on 29 -- 28, page 7. He talked about typically it
8 would not be placed there, the green box. Whether
9 I want it there or not would come down to a
10 discussion with the contractor, landscape
11 architect. Sometimes that's just the contractor,
12 the developer -- that may not be the one.

13 I know Jeff asked him about if he had
14 any concerns when he saw it there, and he testified
15 he didn't have concerns. He thought it was
16 suitable for that application.

17 A. That's on line 1 of page 27, that
18 answer.

19 Q. Okay. So he was aware of it and he
20 didn't think it was okay. He thought it was
21 suitable and for foot traffic. You know, he may be
22 wrong. I don't know. But that's what he said.

23 A. Yes. That is what he said.

24 Q. I guess the point I'm trying to make,
25 and I can find it in other places, he was aware

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1 aware this was put in. The developer didn't want
2 planters, but they left the box there should they
3 change their mind. He was aware of it and talked
4 to the developer about it. That's what he said.

5 A. Again, I think you're adding some
6 specifics that I don't find.

7 MR. HEPWORTH: Well, the quote speaks for
8 itself.

9 Q. BY MR. WILLIAMS: The quote speaks for
10 itself and I've talked to him at length about --

11 MS. CANNON: Join.

12 MR. HEPWORTH: He's already answered your
13 question. You're getting argumentative again.
14 Just -- I know you don't like his answer, but
15 let's --

16 Q. BY MR. WILLIAMS: Well, I guess I
17 ought to ask it this way. If that's what Glenn
18 Anderson says, you don't have any reason to dispute
19 what he says he was aware of or what he said,
20 right?

21 A. I don't dispute my interpretation of
22 what he said.

23 Q. Of this language?

24 A. I don't dispute my interpretation of
25 what he said, but I can't speak for him, Brad.

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1 that was put there and he wasn't concerned about
2 it. If he's wrong, maybe he did something wrong.
3 I don't know. But he knew about it.

4 A. I can agree with that.

5 Q. Okay. So at that point, regardless,
6 if Eckman Mitchell's duty is to tell the architect,
7 hey, there's something here that shouldn't be
8 there, they've discharged their duty. And if
9 Mr. Anderson knows about it, then we no longer --
10 Eckman Mitchell no longer has any duty. Their duty
11 is to tell the architect.

12 MS. CANNON: Objection. There was no
13 indication in that line that Mr. Anderson received
14 his information from Eckman Mitchell. I think just
15 the opposite. He said he was there when they were
16 being installed and noticed them.

17 MR. HEPWORTH: And I object. You're
18 argumentative and also you're asking him to talk
19 about the law. It sounds like a legal --

20 MR. WILLIAMS: No.

21 MR. HEPWORTH: -- question.

22 Q. BY MR. WILLIAMS: I'm asking about
23 this contract that we went over. Their duty is to
24 report to it to the architect. That's -- we've
25 established that. You're not --

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1 A. That is their duty, yes.

2 Q. You have no equivocation about that
3 opinion. Now, if the architect knows about it,
4 knows it's not there, then our duty has been done.
5 Whether he got it from Scott Duke or the developer
6 or someone else, as long as he knows about it,
7 then --

8 MR. BROWN: I'm going to object again. It
9 calls for a legal conclusion.

10 MR. HEPWORTH: I'll object to the form of
11 the question.

12 THE WITNESS: That's something that I'm not
13 qualified to answer that, and I don't see any
14 evidence -- I just don't remember any evidence in
15 there that they brought it to his attention. I
16 don't argue that the architect knew -- knew about
17 it.

18 Q. BY MR. WILLIAMS: Does it matter for
19 purposes -- what is the purpose of that provision?
20 If a general contractor --

21 MR. BROWN: Objection. It calls for a
22 legal conclusion.

23 MS. CANNON: Join.

24 Q. BY MR. WILLIAMS: No, it doesn't. I'm
25 asking you based on 30 years of experience in the

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1 again. He's giving you his answer. You're arguing
2 whether you agree with him or not, but let's just
3 move on.

4 Q. BY MR. WILLIAMS: Well, let me just
5 ask you, what difference does it make what source
6 the information comes from as long as the architect
7 knows there's something not according to plan?
8 What difference does it make what the source is?

9 A. It makes a difference in the lines of
10 communication on the project. Those are ridged,
11 who has the authority to talk to who to receive
12 communication from who. If the end result is
13 fixing any defect, not specifying this one, but any
14 one of them, then it really doesn't matter as long
15 as we correct the defect.

16 Q. Okay. And that's his job, the
17 architect. He's aware of it. He needs to
18 investigate, correct, do whatever. It's the
19 architect's job?

20 A. You continue to tell me what my
21 testimony is.

22 Q. I'm asking you what the purpose of
23 reporting to the architect is.

24 A. Then just ask me, what is his -- what
25 should be his response. And I will say to you he

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1 industry. If a general contractor sees something
2 not up to code, not according to plans, and they
3 tell the architect, what's the purpose of that
4 provision? Why tell the architect there's
5 something wrong here, Glenn?

6 A. To correct or remedy a default -- or a
7 defect.

8 Q. And then is it the architect's
9 responsibility to do that?

10 A. He has the authority to make a
11 decision. Sometimes he will choose to correct it.
12 Sometimes he will choose to let it stay.

13 Q. So if he knows there's something not
14 according to plans, regardless of whether he heard
15 it from Scott Duke or the developer or Stuart
16 Utgaard, it's in his -- it's his responsibility to
17 do something to correct it, investigate it at that
18 point?

19 A. That would become purely opinion at
20 this point in time on my part. That's again -- I
21 agree. That's a legal question.

22 Q. No, it's not. You know the purpose of
23 that provision.

24 MR. BROWN: Asked and answered.

25 MR. HEPWORTH: You're getting argumentative

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1 should thoroughly investigate it, make an educated
2 careful decision, and give clear direction on what
3 should or should not be done.

4 Q. Okay. And if he told the developer,
5 "Hey, there's no planter box in there. Now we've
6 got this box." And the developer said, "Leave it
7 there. We may put a planter in in the future."
8 then is Glenn Anderson liable or negligent? Has he
9 done something wrong at that point?

10 MS. CANNON: I need clarification. You're
11 saying developer, but you're pointing at
12 Sportsman's Warehouse.

13 MR. WILLIAMS: Yeah, the developer.

14 Q. BY MR. WILLIAMS: If he goes to the
15 developer, says, why is this here? We didn't put
16 in a planter. And the developer says, leave it
17 there. We may put in a planter.

18 MS. CANNON: Objection, not in the record.

19 Q. BY MR. WILLIAMS: Okay. Assume that's
20 the case, and it will be in the record, if that is
21 the testimony, who's responsible then, the
22 developer or the architect? Who?

23 A. We've gone around this bush so many
24 times. Let me tell you what I think you're asking.
25 If the architect is notified and he talks it over

1 with the developer, and let's talk in this specific
2 instance on this specific valve box, and the
3 developer says, leave it there. What's the correct
4 thing to do?

5 Q. Yes.

6 A. The best answer I have is I don't know
7 because I don't know all of the details and legal
8 limitations of the lease contract. It is within
9 the contract limit lines and so has the developer
10 stepped over that line? If so, has he done so with
11 authority? Is it Sportsman's responsibility to
12 clarify it? The answer is I don't know, Brad. I'm
13 sorry. I'm not a judge.

14 MR. BROWN: Brad, when you get to a good
15 point, can we take a break?

16 MR. WILLIAMS: Yeah. I just think I have
17 one more question.

18 Q. BY MR. WILLIAMS: Page 46. Glenn
19 testified at line 9, page 46, I think this is
20 Mr. Hepworth, I can't remember -- Ms. Cannon. Do
21 you remember if after you noticed the two boxes in
22 the sidewalk and presumably had this conversation
23 about is there a reason these are here or not, did
24 you have any conversations with your mechanical
25 engineer who helped you with these plans about

1 Q. The architect knew both of those boxes
2 were there in the site?

3 A. That's correct. He knew.

4 Q. And when they did the final
5 walk-through with the developer, Sportsman's
6 Warehouse, and did the punch list, the city
7 inspector, they all went through and nobody said
8 anything about that box, right?

9 MR. HEPWORTH: I'm going to object to the
10 form of the question. It's not a question, but go
11 ahead.

12 Q. BY MR. WILLIAMS: They did do a
13 walk-through?

14 A. He talks about a walk-through. I'm
15 not privy to the punch list and I don't remember
16 off the top of my head specifically what he said.
17 I do know that in my notes I've not noted anywhere
18 that he said I saw the box had settled.

19 Q. They got a certificate of occupancy
20 issued by the city inspector after the final
21 walk-through, which is the architect, the owner,
22 right?

23 A. They did get a certificate of
24 occupancy.

25 Q. And nobody raised any question about

1 those boxes and whether their placement was
2 appropriate in the engineer's opinion?

3 ANSWER: I would not have done that
4 because that's outside our scope of work. In this
5 case the boxes were provided by the developer,
6 which was outside of our scope. The fact that
7 they're behind the sidewalk, that's within our
8 scope, so why are they putting these inside our
9 scope of work. I would have thought they would
10 have been outside of it.

11 And the decision was made by
12 somebody this is where we want them. This is what
13 we're going to do. Okay. Well, we're going to
14 have to work around it or Eckman's going to have to
15 work around it. We do this largely on -- that's
16 our design-build basis. So that is done as a team.

17 Had you read that and do you
18 understand what he's --

19 A. I underlined it.

20 Q. So he was aware they were there?

21 MR. HEPWORTH: Is there a question?

22 Q. BY MR. WILLIAMS: He had conversations
23 about it. There's no question that the architect
24 knew they were there, right?

25 A. They, the two boxes?

1 the suitability? No one: The developer, the
2 architect, the city inspector?

3 A. Not that I know of or remember.

4 MR. WILLIAMS: Okay. That's all I have.

5 MR. BROWN: Let's take five minutes.

6 (A recess was taken from 10:58 a.m. to
7 11:05 a.m.)

8

9 EXAMINATION

10 BY MR. BROWN:

11 Q. We introduced ourselves a little while
12 ago now. My name is Jeremy Brown and I represent
13 Sportsman's Warehouse.

14 A. All right.

15 Q. You're going to have to forgive me
16 because I've been struggling through depositions
17 throughout this case and I may do it again here.

18 I just want to try to clarify a couple
19 of issues to begin with. We have -- and let me
20 know if this is something you've looked into.
21 There's been recent testimony that there are three
22 planter boxes that were installed directly in front
23 of the entrance to Sportsman's Warehouse at the
24 time construction was completed. Are you aware of
25 those boxes?

1 A. I only have a subconscious
2 recollection of them. As I said earlier, I think I
3 can remember seeing greenery there, but I couldn't
4 describe the boxes in any way.

5 Q. And then we have some to the side, and
6 if you're facing the building, to the right-hand
7 side of the building we have what's been described
8 as an irrigation box placed there. You're aware of
9 that, obviously, the box that's been -- we've been
10 talking about all day today?

11 MS. CANNON: It's no longer there.

12 MR. BROWN: Okay.

13 THE WITNESS: I'm aware there was a box
14 there. When I went out to inspect the site, I
15 didn't see it.

16 Q. BY MR. BROWN: And do you have any
17 knowledge or do you know whether the box that we
18 have been discussing that's now been removed has
19 any relation to the planter boxes that are actually
20 in front of the entrance? Does the planter boxes
21 in front of the entrance require that this
22 irrigation box be placed in the sidewalk to the
23 right of the building?

24 A. I have no knowledge of that.

25 Q. Typically, would you need an

1 hang on it. Yes, it could.

2 Q. So this irrigation box we've been
3 discussing, is that all part of the overall
4 landscaping of the area?

5 MS. CANNON: Objection. Vague. Calls for
6 speculation. Answer it if you can.

7 THE WITNESS: Overall is too large of a
8 word. My answer is it could be.

9 Q. BY MR. BROWN: Does it have a purpose
10 other than to provide -- other than for irrigation
11 to landscaping?

12 A. Not known to me.

13 Q. And are you aware of any contracts for
14 anyone to provide irrigation to the Canyon Park
15 development other than through the developers own
16 subcontractors?

17 A. I don't remember reading in these
18 documents or knowing of anything other than -- the
19 fact is I don't even know that Canyon Park was
20 responsible to provide it. I just don't know.

21 Q. You know the landscaping was actually
22 installed by Blaine Pope?

23 A. I saw the contract and so I believe
24 that it was installed. I don't know it.

25 Q. Okay. The only contract you've seen

1 irrigation box that far away from where the
2 planters are installed?

3 A. There's no connection, Jeremy. That
4 box that was there was a valve box covering at
5 least the connection, and possibly an anti-siphon
6 valve. And, again, that's supposition on my part
7 because I don't know. And so if the question is
8 does that box need to be there? Yes, in order to
9 connect and provide water out to unspecified
10 planter areas.

11 Does it need to be there for the three
12 that are in front of the building? Well, if they
13 had live plants in them, they need water from some
14 source. It can be from a watering can. It can be
15 from a pipe. I can't answer that question.

16 Q. So those three boxes that are out
17 front need to have an access point somewhere on the
18 property?

19 A. If they have living plants in them,
20 those plants need a source of water is the best I
21 can tell you.

22 Q. And could that access point be located
23 in the boxes themselves or some other place than
24 the sidewalk area?

25 A. Could is a large word, and so I'll

1 for installation of irrigation and for landscaping,
2 though, is that contract with Blaine Pope?

3 A. Yes.

4 Q. And have you been told or do you know
5 whether -- I may have already asked you this --
6 whether Blaine Pope actually installed this
7 particular box?

8 A. I believe I have been told. I'm not
9 clear on the source of that information, but I do
10 believe that he put the box in.

11 Q. Did you do anything to verify that?

12 A. No.

13 Q. Okay. So what have you done to try to
14 figure out why Mr. Pope was the person who placed
15 this box and why he chose to place it in that
16 particular place?

17 A. I haven't tried to figure that out.

18 Q. Now, have you -- I understand you were
19 not given -- you've been retained by Canyon Park,
20 correct?

21 A. Yes.

22 Q. And Canyon Park entered into a lease
23 with Sportsman's Warehouse; is that correct?

24 A. Yes. I discovered that today, saw the
25 lease document.

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1 Q. Had you ever requested the lease
2 document before today?
3 A. No.
4 Q. Do you think it would be important to
5 know what the lease calls for between the developer
6 and Sportsman's Warehouse, the tenant and the
7 builder of this area, of the building itself?
8 A. It could help to answer some
9 incidental questions on the questions that I was
10 asked to address, yes.
11 Q. Do you still have a copy of the lease?
12 A. Yes.
13 Q. I want you to look at a couple of --
14 let's begin with page 5, paragraph 6, construction
15 of building. And, actually, let me have you go to
16 page 6, paragraph 6.1. I want to just read a
17 section to you beginning with the word
18 "additionally."
19 A. Yes.
20 Q. It says, additionally, on or before
21 the latter date of -- and it gives a couple of
22 dates here and it continues on. The landlord
23 should have completed the site improvements
24 described on Exhibit E-2, concurrent site
25 improvements. Do you see where I'm reading that?

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1 A. I do.
2 Q. Have you looked at Exhibit E-2 yet?
3 A. No.
4 Q. Do you want to turn to Exhibit E-2,
5 please. And I think I said Exhibit E-2.
6 That's --
7 A. It's page 29.
8 Q. Now, as I'm looking at Exhibit E-2,
9 No. 2, it reads all landscaping for the premises
10 and the shopping center as required by law and
11 otherwise agreed by landlord and tenant shall be
12 installed. Did I read that correctly?
13 A. You did.
14 Q. Now, we've already established that
15 the box -- the box's only possible use is with
16 landscaping, correct?
17 A. We established that the box covers a
18 one-inch line coming -- a plumbing line coming out
19 of the building specifically designated for
20 irrigation. We didn't apply the exclusions that
21 you just put to it.
22 Q. Okay. What other uses does it have?
23 A. None that I know of.
24 Q. Okay. Now, would you agree here that
25 any installation of landscaping in the site is a

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1 duty of the developer pursuant to this lease?
2 MS. CANNON: Define site.
3 MR. BROWN: The entire -- the area covered
4 by this lease.
5 MR. HEPWORTH: I'm going to object. It
6 calls for a legal conclusion based on the written
7 document, so the documents speak for themselves.
8 MS. CANNON: I'll join.
9 THE WITNESS: I found it interesting that
10 on Exhibit E-2, sentence 2 says that all
11 landscaping as required, et cetera, et cetera,
12 shall be installed.
13 Q. BY MR. BROWN: Uh-huh.
14 A. By whom?
15 Q. Okay. Let me continue on then. So
16 E-2 is designating that landscaping should be
17 installed?
18 A. Yes.
19 Q. And you would conclude that any
20 planter boxes, any irrigation connections are part
21 of that landscaping?
22 A. I love how you guys come to my
23 conclusions for me. That's a reasonable
24 conclusion, yes.
25 Q. Okay. Let's go back to paragraph 6.1.

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1 I may have already read this, but it says, landlord
2 shall have completed the site improvements
3 described on Exhibit E-2.
4 A. Then that answers the question.
5 Q. So reading this, landlord was to
6 install the landscaping; is that correct?
7 A. He is to install all landscaping for
8 the premises and the shopping center --
9 Q. Correct.
10 A. -- yes.
11 Q. So if the premises -- if portions of
12 the premises are within those contract limit lines
13 that you've described earlier, then this could be a
14 description of an exclusion to those limit lines
15 with the contractor entering into them to place
16 landscaping; is that a fair reading?
17 A. Let's back up and take that a little
18 bit at a time. What was your first if? If
19 something in landscaping has gone beyond the
20 contract limit lines as defined on those drawings,
21 then what's your question?
22 Q. Then that is the landscaper
23 undertaking that work within the contract limit
24 lines you've previously talked about?
25 A. Yes.

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1 Q. And this could be one of the
2 exceptions you've described -- regarding
3 exceptions, this could be one of the exceptions to
4 responsibility within contract limit lines because
5 here we have another entity performing work within
6 those lines, correct?

7 A. That is the situation that occurred,
8 yes.

9 Q. I want to continue on.

10 A. Don't infer from that that I'm saying
11 there was a written exception clearly defined on
12 it. I'm just saying there was crossing of the line
13 by contracted work.

14 Q. Contracted work within this lease
15 agreement?

16 A. Yes. Yes.

17 Q. Now, it says, landlord and tenant
18 agree to coordinate their respective construction
19 of the concurrent site improvements -- and I didn't
20 have you look at concurrent site improvements -- by
21 the landlord and the building by the tenant and to
22 cause their -- no, I did have you look. I'm sorry.
23 I'm confusing myself.

24 Concurrent site improvements, that's
25 what we've just described that's in E-2, correct?

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1 further information on who actually paid or should
2 have paid for the work done by Blaine Pope in
3 installing an irrigation line or an irrigation box?

4 A. Well, specifically there was a
5 connection to a one-inch irrigation line inside the
6 contract limit line, and this says that the
7 developer, the landlord, will pay Mr. Pope or
8 somebody to make that connection.

9 Q. Not only pay them, but it's their duty
10 to make sure that it's done?

11 A. Based on an amalgam of what we've
12 looked at so far, yes. That's right.

13 Q. And it doesn't give -- although it
14 states cooperation, it doesn't give Sportsman's the
15 ability to go in and say this is how you need to do
16 your irrigation work?

17 A. To assume design responsibility, is
18 that what you're asking me?

19 Q. Right. It's not Sportsman's ability
20 to direct how Canyon Park designs their irrigation?

21 A. This does not give them that
22 responsibility or authority, no.

23 Q. Did you find that authority anywhere
24 else?

25 A. No. Haven't looked for it.

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1 A. That's correct. Stuff going on
2 outside the building.

3 Q. And to cause their respective
4 contractors to cooperate with each other to avoid
5 delays in the construction of both the concurrent
6 site improvements and the building; is that
7 correct? Am I reading that correctly?

8 A. You read it correctly.

9 Q. So I'm trying to understand this
10 through your experience, and that's why I'm asking.
11 It seems to me what this is saying is that you may
12 have one entity putting up the building while at
13 the same time another entity, the landlord, is
14 placing these concurrent site improvements. Is
15 that correct?

16 A. Yes. That's right.

17 Q. And that the two of them are to
18 cooperate with each other?

19 A. Yes.

20 Q. And it continues on. The initial site
21 improvements and the concurrent site improvements
22 shall be at the landlord's sole cost and expense
23 and not subject to reimbursement by the tenant?

24 A. That's what it says.

25 Q. So would that continue or provide

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1 Q. Now, I guess what I'm getting at here
2 is we have an irrigation box that was pursuant to
3 the lease to be installed by -- well, we have
4 irrigation to planter boxes, part of the overall
5 landscaping, that pursuant to the lease is to be
6 installed by the developer, correct?

7 A. Yes. Yes.

8 Q. Then we have the developer's
9 contractor actually placing the irrigation box; is
10 that correct?

11 A. Yes.

12 Q. And I don't know -- this is in a
13 deposition yesterday --

14 A. Let me back up. You said we have the
15 developer's contractor actually placing the
16 irrigation box. Was he instructed to do so? We
17 don't know. Did he do so? We have testimony that
18 says he did, and I believe it.

19 Q. Okay.

20 A. Okay.

21 Q. And there was testimony yesterday, and
22 I don't know if you're aware of this through your
23 interactions with the developer, that the type of
24 box that was placed was pursuant to Blaine Pope's
25 contract with the developer?

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1 MS. CANNON: I'll object to that
2 characterization.
3 MR. HEPWORTH: I'm going to object too.
4 **Q. BY MR. BROWN: Were you aware of that?**
5 MS. CANNON: Misstates.
6 MR. HEPWORTH: Misstates.
7 THE WITNESS: No, I'm not aware of that.
8 MR. HEPWORTH: And there's no way for him
9 to be aware of the deposition that happened
10 yesterday, Jeremy.
11 MR. BROWN: And I asked him if he had
12 learned it from any other source was my question.
13 THE WITNESS: No.
14 MR. WILLIAMS: I think you've got the
15 contract right here.
16 MR. BROWN: He already has it?
17 MR. WILLIAMS: Yeah. Mr. Pope's contract
18 with Canyon Park, didn't I ask you about it a
19 minute ago?
20 MS. CANNON: He specifically testified that
21 that was exclusively for the work done within the
22 parking lot.
23 MR. BROWN: And he also testified that he
24 used the box that was called for in that lease.
25 MR. WILLIAMS: Yeah.

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1 MS. CANNON: But it was not directed by
2 that lease. I'm going to object to this again.
3 MR. HEPWORTH: But it's unfair to ask him
4 -- tell him what you intend to --
5 MR. BROWN: I haven't asked my question
6 yet.
7 MR. HEPWORTH: Well, I'm just trying to
8 tell you that --
9 MR. BROWN: Don't interrupt my questioning
10 before I ask it.
11 MR. HEPWORTH: I can talk. I would
12 appreciate it if you would let me talk because I'm
13 going to -- it's going to be the preface to an
14 objection. And while you're looking through
15 things, I'm not going to waste your time and
16 interrupt you, but I object to the process of
17 telling him what someone said yesterday and then
18 saying it inaccurately.
19 MR. BROWN: And I asked him if it was
20 correct with other information he had.
21 MR. HEPWORTH: I'm just making an
22 objection. Go ahead and ask your question.
23 **Q. BY MR. BROWN: Let me hand you -- has**
24 **this been marked as an exhibit today?**
25 A. That's my copy.

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1 **Q. Let me just hand you what's been**
2 **identified as the contract between the developer of**
3 **Canyon Park and Blaine Pope. Have you had a chance**
4 **to review this document previously?**
5 A. Yes, I have.
6 **Q. Can you turn to page 2810-5?**
7 A. I am there.
8 **Q. And, as I understand it, these are**
9 **specifications regarding -- that call for the type**
10 **of equipment to be used for his work at the -- for**
11 **whatever the contract covered, for his work at the**
12 **Canyon Park development?**
13 A. Yes. That's correct.
14 **Q. Can you tell me, looking at the page I**
15 **directed you to, is the type of box installed in**
16 **the sidewalk consistent with what is called for**
17 **under that contract?**
18 MS. CANNON: I'll renew my objection.
19 THE WITNESS: There are sections for pipes,
20 heads, automatic control, valving and
21 miscellaneous. Miscellaneous calls for a valve box
22 to be high impact plastic, green in color. And the
23 box that was installed there was high impact
24 plastic and green in color, according to my
25 interpretation of the photographs I've seen.

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1 **Q. BY MR. BROWN: Oh, you've never**
2 **actually seen the valve box?**
3 A. It was gone.
4 **Q. Now -- I lost my train of thought.**
5 **Just one second. Mr. Pope -- and I'm going to --**
6 **I'm just going to tell you what I remember him**
7 **testifying to.**
8 MR. HEPWORTH: Mr. Arrington.
9 MR. BROWN: No.
10 MR. HEPWORTH: I'm sorry. I thought you
11 said Mr. Pope.
12 MR. BROWN: I did.
13 **Q. BY MR. BROWN: Mr. Pope testified the**
14 **other day -- he was unclear about payment for this**
15 **green plastic box and he said that he could have**
16 **just thrown it in as part of his job for the entire**
17 **project because it's such a big job, he could have**
18 **just added it in and not billed anyone. In your**
19 **experience does that happen on construction sites?**
20 A. Yes.
21 **Q. And if so, obviously, then there would**
22 **be no record of that for either the people not**
23 **associated with Mr. Pope to know why he did that or**
24 **when he did it or the cost or anything about it,**
25 **correct?**

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1 A. If so, then, yes, that's correct.
 2 Q. And I guess my question is if we have
 3 a lease calling for the developer to put in the
 4 irrigation, we have their contractor actually
 5 putting it in, and we have the lease also saying
 6 that Sportsman's has to cooperate with their doing
 7 so, why is the placement of this irrigation box
 8 anyone's responsibility other than Eckman's?
 9 MR. WILLIAMS: Object to the form.
 10 MS. CANNON: I join.
 11 THE WITNESS: Let me think of how to say
 12 this correctly. You are expanding the word
 13 cooperation into a carte blanche authorization to
 14 do whatever the other person wants and you are
 15 applying responsibility to that as well. The
 16 articles of cooperation there say that we need to
 17 work with each other, more importantly communicate
 18 with each other, all parties involved, to see that
 19 the full and satisfactory project is achieved.
 20 Q. BY MR. BROWN: So when you talk about
 21 communication, when Mr. Pope is placing this
 22 planter, should he have actually referred to plans
 23 before he placed the irrigation box?
 24 A. Yes.
 25 Q. And what would -- the purpose of that,

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1 right application for it, he should have talked to
 2 someone.
 3 Q. Now, since he is an employee of Canyon
 4 Park --
 5 A. Yes.
 6 MS. CANNON: I'll object to that
 7 characterization.
 8 Q. BY MR. BROWN: Subcontractor of the
 9 developer.
 10 A. Agreed.
 11 Q. -- and he is going within the contract
 12 limit lines that you have stated apply to Eckman
 13 Construction, should he confirm what he has been
 14 told to do with Eckman Construction?
 15 A. No.
 16 Q. And why is that?
 17 A. Because he has no contractual
 18 relationship with them. He should have talked to
 19 those with whom he was contracted.
 20 Q. Okay. And so if he was told by the
 21 developer supervisor to place this box, then it
 22 wasn't his responsibility to communicate this; it
 23 was the developer's supervisor to make those
 24 communications?
 25 A. It was his, Blaine Pope's,

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1 I take it, would just be to make sure that it's
 2 still needed and to make sure that it's in the
 3 proper place?
 4 MS. CANNON: Objection, calls for
 5 speculation.
 6 THE WITNESS: Among other things, yes.
 7 Q. BY MR. BROWN: What other things?
 8 A. Not only location and proper -- what
 9 was -- I forget the second one. That it was in the
 10 proper place, and what was the other one that you
 11 said?
 12 Q. Proper place and that it was actually
 13 called for.
 14 A. Oh, that it was actually called for,
 15 yeah. And it's connection and transition to other
 16 materials around it and it's proper application.
 17 Yeah, that's what the communication should have
 18 involved.
 19 Q. Should he have also confirmed what
 20 type of box to place there?
 21 A. Apparently -- it's kind of ambiguous,
 22 but it often is in the category of miscellaneous in
 23 specifications. You just don't know where to apply
 24 that. But, apparently, that's what it said to put
 25 there. If he had any inkling that that wasn't the

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1 responsibility to communicate if he had any
 2 hesitance or objection to it. The transfer of that
 3 information then would have come from the
 4 construction manager or supervisor of the
 5 developer.
 6 Q. So it goes up the line from Pope to
 7 the developer's supervisor and maybe communicated
 8 crosswise to the -- to Eckman Construction?
 9 A. Yes.
 10 MR. WILLIAMS: Object to the form.
 11 Q. BY MR. BROWN: Can I have you turn
 12 back to the lease agreement again.
 13 A. Developer to Sports?
 14 Q. Yes.
 15 A. Okay.
 16 Q. Can you turn to page 6?
 17 A. Yes.
 18 Q. And it says at the top of the page,
 19 and I'm just going to read it. Tell me if I read
 20 it incorrectly. Tenant agrees to diligently
 21 commence and complete construction, which will
 22 result in the building to be constructed on the
 23 premises with exterior architectural features as
 24 set forth in Exhibit F attached to this lease,
 25 exterior features.

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1 A. Read correctly.
2 Q. Is that uncommon in developments of
3 this kind that the developer will designate the
4 exterior features of any building constructed
5 within the development?
6 A. It's very common.
7 Q. And can you please turn to the -- I
8 think it lists Exhibit F. Will you turn to
9 Exhibit F and I'll see if I can find what page it's
10 on.
11 A. 30?
12 Q. I don't think it has a page. It's
13 just listed as F-1 at the bottom.
14 A. Okay.
15 Q. Now, this is what that paragraph is
16 referring to, is it not?
17 A. Yes.
18 Q. Looking at Exhibit F and the exterior
19 features, is that consistent with how the building
20 was actually constructed? And I'm referring to
21 with the presence of pillars in front of the
22 building and not planter boxes.
23 A. I would have to look at the photograph
24 of it now. My memory is not clear enough to say.
25 Q. Let me see if I can break that down

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1 for this building. I believe it was C-1 and C-2
2 and A.01; is that correct?
3 A. I have been given what I was led to
4 believe was a full set of drawings on 8 and a half
5 by 11 paper, and that I asked for two pages, A0.1
6 and P2.1 to be enlarged.
7 Q. Did you also review C-1 and C-2, or do
8 I have that down incorrectly?
9 A. Those are EHM's drawings, and, yes, I
10 have reviewed them.
11 Q. What are the dates of C-1 and C-2?
12 A. March 27th, '03, with revisions 3-11
13 and revisions on April 24th with C-2 the same.
14 Q. And on those diagrams do -- these
15 columns that are in Exhibit F, are they featured?
16 A. The ones on the far east and west side
17 of the building with the pergolas on them?
18 Q. Yes.
19 A. They are not.
20 Q. And, instead, I guess, we have this
21 area of differing -- I forget how you describe
22 it -- area of differing concrete that could or
23 could not be planter boxes; is that correct?
24 A. I have a contour shape with a
25 different surface designation on it, yes.

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1 then. This Exhibit F seems to show the -- can we
2 agree that the top illustration on that page is the
3 front of the building?
4 A. Yes.
5 Q. And in front of the building to the
6 right-hand side there are a couple of -- I think
7 they've been described to me as trellises; is that
8 the correct term?
9 A. Pergolas.
10 Q. Okay. I'll go with that. It's harder
11 to say. Pergola. So they are present within
12 Exhibit F, those pergolas, those two columns with
13 the connecting structure at the top?
14 A. Yes.
15 Q. And in the area between the far right
16 wall and the entrance to the building there are no
17 planter boxes shown there; is that correct?
18 A. None that I can see.
19 Q. If I told you, and I think we can just
20 look to the date line, that this agreement was
21 signed -- on the front page it says April 17th,
22 2003.
23 A. Yes.
24 Q. Now, I just want to -- you stated
25 earlier that you have reviewed a couple of plans

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1 Q. Now, go to the other document you
2 reviewed, plan A-1.
3 A. Yes. Are you speaking A0.1 or A-1?
4 Q. I forget which one we -- which one do
5 you list in your report?
6 A. A0.1.
7 Q. Can you turn to that one and maybe
8 I'll lean over here. Could you go to A0.1.
9 A. This is it.
10 Q. I mean A-1.
11 A. Yes.
12 Q. I believe this is a little -- gives us
13 a little larger view of the front of the building;
14 is that correct?
15 A. Yes, it does.
16 Q. And this diagram, are those columns in
17 place? I forget what you call them. Will you tell
18 me one more time?
19 A. The structure is called a pergola, and
20 it is just a suspended or raised trellis, but
21 pergola sounds cool.
22 There's no mention that those columns
23 -- what those columns support, but there is a
24 triangular shape arrangement of three columns on
25 the northeast corner. There are no columns shown

1 on the northwest corner and there are four columns,
2 two at the entry of the building and two to the
3 west of the entry shown.

4 **Q. Okay. And those areas of differing**
5 **surface that you described earlier, are they still**
6 **on plan A-1?**

7 A. A contour shape is not there.

8 **Q. What is the date of plan A-1?**

9 A. May 2nd, 2003, with revisions May
10 12th, 2003, noted for addendum 1.

11 **Q. I just want to try to summarize this**
12 **the way it makes sense to me. Tell me if I'm**
13 **incorrect. There are plans in May of '03 that may**
14 **or may not show planter boxes but do not show these**
15 **columns with the trellis, correct? That's C-1 and**
16 **C-2.**

17 MS. CANNON: March.

18 **Q. BY MR. BROWN: You're right, March.**
19 **Thank you.**

20 A. March with a revision in April.

21 **Q. Okay.**

22 A. And, no, my best interpretation is
23 that it does not show columns at the northeast and
24 northwest corners of the building.

25 **Q. Right. That's what I was trying to**

1 **Q. After that point if they send a**
2 **subcontractor out there to install an irrigation**
3 **box, they should make him aware of the change where**
4 **there's no planter boxes in that area, as called**
5 **for under the lease and plan A-1?**

6 MS. CANNON: Objection. Calls for
7 speculation that the developer had Blaine Pope
8 install the planter box. You can answer if you
9 know.

10 THE WITNESS: When a contractor is sent to
11 do the job, he expects to be given clear, concise,
12 and accurate information, drawings and
13 specifications to work from, yes.

14 **Q. BY MR. BROWN: In your experience**
15 **should Canyon Park's supervisor have been aware of**
16 **what's called for in the lease and whether they're**
17 **in the actual plans at the time of installation?**

18 A. To personalize the question, every
19 company handles management and flow of information
20 differently, and I can't comment.

21 **Q. What would be the best practice?**

22 A. Same answer.

23 **Q. In your review of the documents, does**
24 **there appear to be any confusion whether at the**
25 **time of construction there were to be planter boxes**

1 say.

2 A. Yup. That's what I'm saying.

3 **Q. And then the following month in April**
4 **of '03 a lease is entered and exterior features are**
5 **designated in the lease that include the columns**
6 **and no areas of differing surface that could be the**
7 **planter boxes. That's Exhibit F again.**

8 A. That's a correct statement.

9 **Q. Then the plans after that, looking at**
10 **A-1, show this change?**

11 A. Does not show a planter box and does
12 show some exterior columns.

13 **Q. And should the developer, considering**
14 **that they entered into this lease, have been aware**
15 **or made their contractors aware that any plans for**
16 **a planter box no longer existed?**

17 A. Would you ask that once more so I can
18 make sure I understand it.

19 **Q. We have a developer who contracts to**
20 **enter irrigation, correct?**

21 A. Yes.

22 **Q. And they enter in a contract that has**
23 **an exhibit that shows the outside of the building**
24 **without planter boxes, correct?**

25 A. Yes.

1 on that as you're facing the building on the far
2 right side?

3 A. Did you use the phrase "in my review
4 of documents"?

5 **Q. Yes.**

6 A. Yes. There does appear to be some
7 confusion.

8 **Q. What is the basis of that confusion?**

9 A. As mentioned in deposition -- I'd have
10 to go back and spend the time to find them, but
11 from deposition answers there appears to have been
12 that the landscape -- that the planter boxes were a
13 moving target. Not everyone was on the same page.

14 **Q. Okay. And if we look to determine**
15 **when that moving target was settled, would we rely**
16 **on the building plans and the lease to do that?**

17 A. Those would be applicable documents,
18 but they may not be the whole case.

19 **Q. What else would there be?**

20 A. There would be notes and memos and
21 communications. Job logs.

22 **Q. So if we're talking about the**
23 **installation of irrigation, those would be notes,**
24 **memos and job logs of the developer and their**
25 **subcontractor?**

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1 A. One more time, please.
 2 Q. If we're talking about the
 3 installation of irrigation and we wanted to refer
 4 to what was known at the time as far as installers
 5 of that irrigation, we would look at the notes and
 6 job logs of the developer?
 7 A. Yes. And the engineer, EHM, who was
 8 part of that and Blaine Pope and Eckman Mitchell
 9 and Sportsman's Warehouse. They are all
 10 interrelated by contract, one with another, and the
 11 contract basically says you will all talk to each
 12 other and play nice together.
 13 Q. And so what we don't know at this time
 14 then, if I understand you correctly, was what
 15 communication was taken from the people who placed
 16 this irrigation box, what communication they had
 17 with everybody else?
 18 A. Correct.
 19 Q. Can you turn to -- do you have your
 20 report in front of you?
 21 A. Yes.
 22 MR. HEPWORTH: Are you going to leave me
 23 some time?
 24 MR. BROWN: I think he said he's not in a
 25 rush anymore.

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1 THE WITNESS: At noon I'm going to go make
 2 a phone call and we'll fix it, yes.
 3 MR. BROWN: I don't think I've taken that
 4 much time, comparatively.
 5 MR. HEPWORTH: Well, it's all relative. If
 6 you take all of the remaining time, that's a lot of
 7 time.
 8 MS. CANNON: We've got you covered.
 9 THE WITNESS: It's not done till Nikki says
 10 we're done.
 11 Q. BY MR. BROWN: Can you turn to page 5,
 12 please.
 13 A. Yes.
 14 Q. And I'm looking at the second full
 15 paragraph on that page.
 16 A. Yes.
 17 Q. Before I get into this, this was an
 18 opinion that was prepared and given to us by, I
 19 guess, Ms. Cannon of Tolman & Brizee. Have you
 20 seen this document before?
 21 A. I wrote it.
 22 Q. Okay. So this -- while there --
 23 A. I'm sorry. The answer is yes.
 24 Q. And just so we're clear, there are
 25 areas and opinions that extend beyond your opinion.

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1 So when you say you wrote it, are there certain
 2 sections that you wrote?
 3 A. No. I wrote it.
 4 Q. So the areas that speak about
 5 Ms. Kambrough's (phonetic) opinion, you wrote that
 6 also?
 7 MS. CANNON: You're referring to different
 8 documents. He has an initial report that I told
 9 you about that I have asked him to hold off on.
 10 You're talking about --
 11 THE WITNESS: The affidavit?
 12 MS. CANNON: No. The expert disclosure.
 13 You're talking about the expert witness disclosure.
 14 THE WITNESS: I thought who.
 15 Q. BY MR. BROWN: Just so we've got it,
 16 what you were looking at is a report you were asked
 17 to prepare but you held off on disclosing that at
 18 this point?
 19 MS. CANNON: That's correct. I have
 20 instructed him to do so because of these ongoing
 21 depositions. I keep funneling him additional
 22 deposition testimony and asking him to incorporate
 23 that in. So, yes, that is correct.
 24 Q. BY MR. BROWN: So the document you
 25 were looking at, whatever opinions are in there, we

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1 don't know about, you haven't told us about them
 2 yet?
 3 A. Actually, I don't talk to you.
 4 MS. CANNON: I think that's what Brad was
 5 referring to earlier when he wanted to leave this
 6 deposition open pending receipt of that because,
 7 obviously, it needs to be supplemented.
 8 MR. BROWN: I'm just wondering about the
 9 date of it and why it's necessary to hold off for a
 10 while about it.
 11 MS. CANNON: Because of the ongoing
 12 depositions that we've been --
 13 MR. HEPWORTH: We've got an affidavit. We
 14 kind of know what he's going to say.
 15 MR. BROWN: I hope so, but I'm worried that
 16 maybe I don't.
 17 MS. CANNON: I'm sorry you missed that
 18 conversation between us earlier.
 19 THE WITNESS: The discovery of expert
 20 witnesses document of some date? Okay.
 21 Q. BY MR. BROWN: Can I see what you're
 22 referring to there so I make sure that we're on the
 23 same page?
 24 A. Just a moment. You certainly may.
 25 MS. CANNON: That's it, the expert witness

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1 disclosure.
2 MR. BROWN: Okay. I'm assuming this is the
3 same one?
4 MS. CANNON: I think I only prepared one so
5 I hope so.
6 Q. BY MR. BROWN: You're being handed
7 what's been filed with the court as defendant,
8 Canyon Park Management, and a whole list of names
9 there, a disclosure of expert witnesses. Do you
10 see that?
11 A. I have that.
12 Q. Have you reviewed this document
13 before?
14 A. I have read it one time.
15 Q. Okay. When you read it, is there
16 anything within the opinions expressed in that
17 disclosure -- when did you read it?
18 A. When it was sent to me. Well, let's
19 see. This list would tell me. No, it won't. I'll
20 have to go back and find that letter. Is that an
21 important date?
22 Q. We can probably come back to it.
23 A. Okay. Because I would be happy to
24 find that. I just stuck that letter back in.
25 Q. Are you looking at your billing letter

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1 or --
2 A. No. Well, it is dated September 10th;
3 is that correct?
4 THE WITNESS: Where would I find the date
5 on that?
6 MS. CANNON: It was signed August 31st.
7 THE WITNESS: 31st of August. So my best
8 assumption is that I received it approximately the
9 first week in September. And that fits well with
10 my memory of about where this is in the document
11 flow.
12 Q. BY MR. BROWN: So you received it
13 after it was signed and sent to the court?
14 A. Yes.
15 Q. When you were able to -- when you did
16 receive it and you were able to review it, do you
17 disagree with any of the opinions that are
18 expressed in this document that are attributed to
19 you?
20 A. I don't remember that I did. I don't
21 remember that I objected to any of them because I
22 did not contact Nikki about it.
23 Q. Okay. And I guess it's a stupid
24 question, but from everything you said, you did not
25 write these opinions?

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1 A. I did not.
2 Q. Do you know if -- did you provide
3 notes that they were based upon? Are these
4 consistent with a writing that you have produced
5 to --
6 A. This was written after I produced an
7 initial report to counsel.
8 Q. Okay. So there might be an initial
9 report out there that's separate from this
10 document?
11 A. There might.
12 MR. HEPWORTH: There is. We've already
13 talked about that.
14 MS. CANNON: We've established that.
15 Q. BY MR. BROWN: There is. Okay.
16 I want to go to page 5 of this
17 disclosure.
18 A. All right.
19 Q. Have you arrived at that area?
20 A. Yes. I'm sorry. I thought you were
21 talking to counsel. Yes, I have.
22 Q. I want to look at the second full
23 paragraph there.
24 A. Yes.
25 Q. It says -- beginning with the second

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1 line beginning with the word "one."
2 A. Yes.
3 Q. Can you read the remainder of that
4 paragraph to me?
5 A. "One is the simple," that one?
6 Q. Yes.
7 A. One is the simple placing of a
8 concrete bearing pad beneath the box legs. The
9 locale could also have been over-excavated by 12 to
10 16 inches and large diameter rock, parenthesis, one
11 to two-inch, parenthesis, placed in the excavation.
12 Neither of these methods is uncommon. Both should
13 have been readily known to a design professional or
14 a construction supervisor.
15 Q. Okay. That area I just had you read,
16 is that consistent with your opinions to date
17 still?
18 A. Yes, it is.
19 Q. And I didn't have you read the
20 sentence before that, maybe I should have, but I'm
21 understanding this is your opinion on how this box
22 could have been placed in a more appropriate
23 manner?
24 A. Yes.
25 Q. Now, I'm reading this as saying that,

1 this type of box could have been used but you would
2 want to make some other changes to what is beneath
3 that box. Is that correct?

4 A. My opinion is that this is not my
5 first choice for the material of a box. But if it
6 is the ultimate choice of whoever has the authority
7 to make that decision, yes, there are other things
8 we could have done to make it more stable.

9 Q. And what is -- the first one is
10 placing a concrete bearing pad beneath the box
11 legs. What does that entail?

12 A. Just that. If you'll picture in your
13 mind a paving step stone, that's a concrete block.
14 And a block like that, or even using some of those,
15 could have been placed down below this box for the
16 legs of the box to sit on that would have increased
17 its bearing surface and then also would have
18 funneled any water away -- if water came in, away
19 from the bearing legs of those and help it to
20 remain stable.

21 Q. Are these rocks then -- I take it
22 they're buried beneath the box; is that correct?

23 A. Yeah. That's the second alternate.

24 Q. No. Maybe I used the wrong term with
25 rock. This concrete pad --

1 A. That is what we have here.

2 Q. What about -- and I don't want to
3 spend too much time on this. The next one is to do
4 the same thing but to use a rock to do it; is that
5 correct?

6 A. Yes. You just dig the hole 12 to 16
7 inches too deep, and the bottom 12 to 16 inches are
8 filled with a large diameter rock that provides a
9 stable bearing surface and allows any water that
10 comes in there to quickly flow away, thereby
11 stopping the possibility of it settling.

12 Q. And I want to make sure I'm clear on
13 this. It helps the water to flow away. Does it
14 also help to prevent settling from compaction from
15 forces on the top of the box?

16 A. Yes, to a limited degree. Pure clean
17 aggregate does have a slightly larger bearing
18 capacity than native soil, so it does help it, but
19 not significantly. Its greatest function is to
20 stabilize and get rid of water.

21 Q. And would placing -- going back to
22 your first recommendation, would placing a concrete
23 bearing pad have a greater effect on reducing any
24 aboveground force pushing that box down?

25 A. It would be the first method I would

1 A. Yes.

2 Q. -- is buried beneath the box?

3 A. Correct. It's part of --

4 Q. Directly underneath the box?

5 A. Yes.

6 Q. So that would be part of -- when we
7 talk about ground preparation or pad preparation,
8 that would be part of that, would it not?

9 A. No.

10 Q. Well, okay. If we want to do pad
11 preparation specific for what is required by this
12 box, it would be part of that?

13 A. I don't like that term. If you called
14 it preparation for the installation of the box, I'm
15 fine with that, yes.

16 Q. Would there be any portion of these
17 concrete slabs that would extend up and be visible
18 around the box?

19 A. No.

20 Q. Now, is this a common practice to do
21 something like this, to place concrete blocks
22 underneath a box of this type?

23 A. It's a common practice to place
24 bearing blocks under open-bottom boxes.

25 Q. And that's what we have here?

1 choose, yes.

2 Q. Is that because it's more beneficial
3 in that regard?

4 A. I think it's better.

5 Q. Have you done this yourself in
6 construction that you've been involved in?

7 A. Place a bearing pad beneath an open
8 bottom box?

9 Q. Yes.

10 A. Yes.

11 Q. Okay. Did you ever do it without
12 placing a bearing pad or rock or something below
13 the open bottom box?

14 A. Yes.

15 Q. When do you do that?

16 A. When it's in a nontraffic area and in
17 an unfinished surface area such as dirt or grass.

18 Q. Now, if the person who installed the
19 box -- and I believe it's, in fact, the case here
20 -- didn't do either of these two recommendations --
21 when you're looking at the box, how do you know
22 whether they put this bearing pad underneath or a
23 rock underneath or whether they didn't do anything?
24 How can you tell?

25 A. You open the lid and look.

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1 Q. And you wouldn't cover those with dirt
2 after you put them down?

3 A. Only outside the box.

4 Q. So do you place any blame on whoever
5 placed the box for not following these
6 recommendations?

7 A. Yes. My opinion is that they bear
8 some of the responsibility.

9 Q. Would you expect -- never mind. I
10 just want to clear up maybe an inconsistency in
11 this report also, the paragraph above where we were
12 just reading on page 5.

13 A. All right. I'm there.

14 Q. The top paragraph of page 5 reads --
15 there's a sentence that reads, knowing that
16 Sportsman's Warehouse used this sidewalk area for
17 the movement and display of trailers or other
18 recreational equipment provides a logical answer as
19 to why this box settled below its original setting.

20 Did I read that correctly?

21 A. You did.

22 Q. Now, this report was prepared, I take
23 it, before you were really involved in the case?

24 A. That's incorrect.

25 Q. Did you have knowledge of any use of

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1 A. My memory as to dates would not allow
2 me to contest it because that's all I have is my
3 memory.

4 Q. Now, what weight of vehicle would
5 cause a box of this type to sink? Do you offer an
6 opinion on that?

7 A. There are so many variables that I
8 can't answer the question as generally as you asked
9 it.

10 Q. Well, is there a weight limit where
11 you'd say this type of vehicle can be taken over
12 the box and it won't cause any harm but if it's any
13 heavier than this, we're going to have a problem?

14 A. No. I'm not qualified to do that.

15 Q. Do you know whether driving a
16 four-wheeler over this could potentially cause it
17 to sink?

18 A. I believe that's what I said. It
19 provides a logical answer as to why this box
20 settled.

21 Q. There may be some -- there was
22 testimony the other day, and there may be some
23 confusion on the extent or the exact areas, but
24 there's testimony the other day that Canyon Park's
25 snow removal company used a four-wheeler in the

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1 trailers on this sidewalk at the time you prepared
2 this report?

3 A. Yes. It says I have personally seen
4 the results of light to medium vehicles and
5 equipment driven over these types of boxes placed
6 in the ground, and, more accurately, I have seen
7 light vehicles driven over that area --

8 Q. Okay.

9 A. -- i.e., trailers on boats and
10 four-wheel ATVs.

11 Q. Are you talking about this particular
12 building?

13 A. This particular building.

14 Q. When did you see that?

15 A. Sometime between when it was opened
16 and when I went back.

17 Q. Do you have any dates?

18 A. I do not.

19 Q. Do you know if it was after 2006?

20 A. I do not.

21 Q. The testimony in this case is that
22 that did not occur until after the time period of
23 Ms. McDevitt's fall. Do you have any reason to
24 change -- do you have any reason to not believe
25 that testimony?

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1 area of the sidewalk to remove snow. If that is
2 true could that be a possible cause of the sinking
3 of the box?

4 A. I would be skeptical of that because
5 of the frozen condition of the ground beneath it.
6 It probably would preclude any plasticity of the
7 soil.

8 Q. So that would be based upon the
9 temperature at the time that this happened?

10 A. Yes.

11 Q. Could you rule that out? You said you
12 doubt that. It's a possibility, is it not?

13 A. I used the word skeptic and that's
14 where I'll stay.

15 If this is a convenient place, could I
16 step outside and make a phone call?

17 MR. BROWN: That's fine.

18 (A recess was taken from 12:02 p.m. to
19 12:06 p.m.)

20 Q. BY MR. BROWN: I've referred you a
21 couple of times to Exhibit F of the lease, which
22 shows exterior features of the building.

23 A. Yes.

24 Q. And I don't know this myself. I'm
25 just wondering, have you reviewed any plans that

1 dictate the exterior features of the Canyon Park
2 Development including this building?
3 A. Have I reviewed any plans that
4 dictated -- no.
5 Q. Let me back up. Do you know who the
6 architect was for the exterior features?
7 A. No, I do not.
8 Q. Do you know in what detail -- have you
9 reviewed any plans regarding the exterior features
10 of these buildings?
11 MS. CANNON: Other than Sportsman's you're
12 talking about?
13 Q. BY MR. BROWN: Well, even the
14 Sportsman's plans, I mean, have we seen -- have you
15 reviewed detailed plans of the exterior of the
16 building? If so, I just wondered if you could
17 direct me to it.
18 A. Let's go to page A something, A-3.
19 There is no A-3, at least not in sequence in those
20 drawings that I have been given. So the answer is,
21 no, I haven't.
22 Q. So do you know what entity -- okay.
23 Through your investigation in this case, do you
24 know whether the developer hired an independent
25 architect to design the exterior features?

1 A. I don't know.
2 Q. So whatever is occurring from the
3 exterior wall of the Sportsman's Warehouse out to
4 the curb, do we have specific plans for those
5 exterior areas?
6 A. I don't have them, no.
7 Q. Would you expect that those would be
8 part of the plan provided by the architect for the
9 exterior features?
10 A. Yes.
11 Q. And could those -- would it -- okay.
12 I'm just wondering -- I mean, I haven't seen them
13 and I'm just wondering if you've seen any and if
14 those might be helpful if we have the plans of this
15 exterior area of the building?
16 A. It would be very helpful in
17 construction. In resolution I don't know the
18 answer to that.
19 Q. Have you requested to view those plans
20 with anyone from Tolman and Brizee?
21 A. The exterior elevations? When you say
22 those plans --
23 Q. Okay. The plans I've been talking
24 about that would dictate the exterior features of
25 the building.

1 A. I have not asked to see them and they
2 have not asked me to review them.
3 Q. Okay. On the lease, as I see it on
4 page 6, we've looked at this area before?
5 A. Yes.
6 Q. The first full sentence reads, and
7 tell me if I read this incorrectly, tenant agrees
8 to diligently commence and complete construction
9 which will result in a building to be constructed
10 on the premises --
11 A. Stop. First full sentence where?
12 Q. At the top of page 6.
13 A. Okay. In the second line. I'm with
14 you. Thank you.
15 Q. Probably I read too fast and I don't
16 know where I left off. I read the section though
17 to say that the building must be constructed with
18 exterior architectural features as set forth on
19 Exhibit F attached to the lease.
20 A. I read that also.
21 Q. So if we need to know what the
22 exterior features are, we need to know what the
23 plans are that Exhibit F is based off of.
24 A. What point in time are you talking
25 about, if we need to know now or if we need to know

1 during construction?
2 Q. Either one. Is there a difference, in
3 your mind?
4 A. Absolutely. This is a preliminary
5 document and the drawings that you see on Exhibit F
6 would be what's known as conceptual. They convey a
7 basic idea. There's absolutely no detail to them.
8 These drawings should then have been taken and
9 incorporated by GA Architects into their drawings
10 and it should be on page A-3, which is what it
11 shows on their schedule.
12 Q. Okay. You don't see them there?
13 A. I don't find A-3, no.
14 MS. CANNON: I'll indicate for the record
15 that the plans that he has been referring to, which
16 I think we supplied in discovery previously, were
17 plans provided to us that the developer has that
18 they received -- those are basically the bid set
19 that was provided to them by GA Architects. So
20 that's -- that's where those plans came from, just
21 by way of explanation.
22 MR. BROWN: I guess I'm just asking is
23 there another set of plans that we don't have that
24 deal with from the wall of the building out to the
25 sidewalk?

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1 MS. CANNON: I will tell you that those are
2 the only plans the developer has received. They
3 did not receive as-builts, so when I asked for
4 plans from the developer, that is what they were
5 able to give me. If you guy have the plans, I
6 would expect one of you --
7 MR. BROWN: I think it was put together by
8 an outside architect hired by the developer, and
9 that's what I'm trying to find out, if that's the
10 case.
11 MS. CANNON: And that's why I was asking
12 you earlier to clarify. Are you talking about
13 plans for the entire site or just the store? These
14 are the plans for this store. I mean there might
15 very well be, and I'm sure there are, plans for the
16 remaining buildings that house TJ Maxx through Best
17 Buy. And that's why I was asking for clarification
18 a ways back on that.
19 But I think anything relative to the
20 exterior of the store would not be included in
21 those plans because this wasn't conceived yet at
22 the time those plans were drawn up. In fact, I
23 think the testimony --
24 MR. BROWN: Now you're testifying, and I
25 don't want you to do that because I think this

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1 estimate?
2 A. 500, 600.
3 Q. Generally when you were involved, were
4 you involved as a general contractor?
5 A. Yes.
6 Q. Did Starr Corporation do much
7 subcontract work?
8 A. We may do one subcontract every five
9 years. Just very seldom.
10 Q. 90, 95 percent of your work was a
11 general contractor?
12 A. Yes. Yes.
13 Q. What percentage of those were
14 design-build projects?
15 A. Are we talking back to the entire
16 career?
17 Q. Yes.
18 A. 5 percent or less. In the last three
19 years, 40 percent or more.
20 Q. Is design build a new building method
21 that is gaining in acceptance or is it just your
22 company is focused more on that?
23 A. Two questions. Is it new? No, it's
24 not. It's been around for a long time. The
25 federal government's using it for about 20 years.

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1 building is on the CC&R's and so I don't want to --
2 MS. CANNON: Not as a stand-alone.
3 MR. BROWN: That's why I don't want us
4 arguing on the record, Nikki.
5 MS. CANNON: No. But I believe that that's
6 in deposition testimony.
7 MR. BROWN: I think that's all I have. Do
8 you want to take over, Jeff?
9
10 EXAMINATION
11 BY MR. HEPWORTH:
12 Q. Mr. Arrington, my name is Jeff
13 Hepworth and I represent the plaintiff in this
14 case, Eileen McDevitt, and I am going to do my
15 absolute very best not to replot old ground to the
16 extent that it's already been asked. I'm going to
17 talk about some of the same issues because there
18 are only a few issues, so some repetition is
19 unavoidable, but I'm going to try to stick to your
20 affidavit, just so you know where I'm headed.
21 I'm going to ask you a couple of
22 background questions and I'd ask that you put your
23 builder's hat back on in relation to these
24 questions. Approximately how many buildings have
25 you been involved in constructing, just a rough

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1 Private industry has been using it for --
2 significantly for 10 to 12 years, and in Idaho, the
3 last three to five years.
4 Q. Gaining more acceptance in Idaho?
5 A. Gaining more acceptance, yes.
6 Q. Have you ever been involved in -- let
7 me back up. Do you characterize the construction
8 of the Sportsman's Warehouse at Canyon Park a
9 design build?
10 A. No.
11 Q. What would you characterize it -- how
12 would you characterize it?
13 A. A hybrid, but primarily design-bid
14 build. I see no evidence that it was competitively
15 bid, but at least was confirmatively bid.
16 Q. So the classic design build would not
17 have a competition element to it where there were
18 bids?
19 A. Not a dollar competition following
20 design but a qualifications competition prior to
21 anything beginning.
22 Q. From my perspective it looks like
23 there's basically two very separate designs and
24 construction projects on the entire Canyon Park
25 project. Would you agree with that?

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1 A. Two separate buildings?
2 Q. Well, what I call the developer,
3 Canyon Park, looks like they were generally
4 responsible for the site improvements.
5 A. All right.
6 Q. And that that was probably handled
7 through their own design professionals, which looks
8 like it was EHM, and they had their own
9 construction team; do you agree with that?
10 A. All the evidence I see says that
11 that's correct.
12 Q. And then the construction of the
13 Sportsman's Warehouse building itself was done
14 through a team originating with Sportsman's
15 Warehouse?
16 A. Yes.
17 Q. Sportsman's Warehouse had hired an
18 architect, correct?
19 A. Yes.
20 Q. Sportsman's Warehouse hired a general
21 contractor?
22 A. Yes.
23 Q. And Sportsman's Warehouse was mostly
24 responsible for building the building itself and
25 the design of the building?

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1 MR. BROWN: Objection. Calls for a legal
2 conclusion.
3 THE WITNESS: I don't like your phrasing on
4 that, Jeff, they were responsible for the
5 construction of the building. They were not. They
6 hired someone to construct the building for them.
7 They were the final authority on how the building
8 was designed and what was acceptable.
9 Q. BY MR. HEPWORTH: And the only
10 distinction I'm trying to make is Sportsman's
11 Warehouse, even though they didn't own anything,
12 kind of acted in the role of an owner in terms of
13 they constructed a building which they designed?
14 A. They had a building constructed which
15 they had designed.
16 MR. BROWN: Object to the form.
17 Q. BY MR. HEPWORTH: This is kind of an
18 unusual situation, isn't it, where you actually
19 have a tenant building the building on land that
20 the landlord owns?
21 A. Only in rural areas. It's reasonably
22 common in metropolitan areas.
23 Q. Is this fairly uncommon for Twin
24 Falls?
25 A. Yes.

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1 Q. Have you ever been involved in a
2 project like this?
3 A. No.
4 Q. In your affidavit you refer to
5 contract limits. Could you explain what contract
6 limits are?
7 A. Is it --
8 Q. Yeah. That was the word in page 6.
9 In quotes it says -- do you have that, your
10 affidavit?
11 MS. CANNON: Here it is.
12 THE WITNESS: Okay. Thank you.
13 Q. BY MR. HEPWORTH: Page 3, paragraph 6.
14 A. Okay. Thank you.
15 Q. And in your affidavit you put the
16 words "contract limits" in quotes. And it
17 generally describes or defines what contract limits
18 are. We don't need to go back over that, but what
19 is the purpose of having contract limits?
20 A. To define responsibility and
21 authority.
22 Q. Are the contract limits designated on
23 the plans that you've been able to look at?
24 A. Yes. There's a dashed line that shows
25 and is clearly labeled contract limits.

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1 Q. I have the EHM plans that I presume
2 were produced by Canyon Park. These were submitted
3 to the city. Are the contract limits designated on
4 those plans?
5 A. They are not.
6 Q. What plans did you see where they
7 actually had the contract limit line on the plans?
8 A. They are the ones that are produced by
9 GA Architects.
10 MR. WILLIAMS: Here's one.
11 THE WITNESS: Page A0.1, A.1.
12 MR. WILLIAMS: Right down there, Jeff.
13 THE WITNESS: Page A-2. There are a number
14 of places.
15 Q. BY MR. HEPWORTH: And is this the set
16 of plans that was submitted to the city, do you
17 know, or is this the as-builts?
18 A. I don't know.
19 Q. Do you know if there's a difference?
20 A. Have we got a revision date? No --
21 oh, there it is. Provide sprinkler supply line.
22 Q. In any event -- I don't want to waste
23 any more time -- the contract limit line is
24 specifically delineated on the plans that were
25 utilized by the parties involved in the

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1 construction project, correct?
 2 A. They're specifically denoted on the
 3 plans drawn by GA Architects.
 4 Q. Is that a standard thing to do in the
 5 industry?
 6 A. Yes.
 7 Q. And the purpose of that is to do what?
 8 A. To define the limits of responsibility
 9 and authority.
 10 Q. So if the work was done on one side of
 11 the contract limit line, say, the parking lot side,
 12 that was clearly the responsibility of Canyon Park,
 13 correct, the developer?
 14 A. It's clearly outside the limits of
 15 this contract.
 16 Q. So you're not prepared to say what
 17 happens on one side of the line. You're just
 18 saying what is allowed to happen inside the lines?
 19 A. That's correct.
 20 Q. So --
 21 A. Because it's a continuous line, it
 22 says this is what this project is about.
 23 Q. So if work was done inside the
 24 contract limit lines as set forth in writing on the
 25 plans, that would ordinarily be the responsibility

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1 A. No.
 2 Q. So can we just agree that -- and I
 3 think Mr. Anderson referred to it as a team. And
 4 I'm just going to refer to them as the Sportsman's
 5 Warehouse team. When I say that I'm referring to
 6 Sportsman's Warehouse, their architect, their
 7 general contractor. Is that okay?
 8 A. Acceptable.
 9 MR. BROWN: I wouldn't appreciate the
 10 confusion in the issues.
 11 MR. HEPWORTH: Well, that's why you get to
 12 do your depositions and I get to do mine.
 13 Q. BY MR. HEPWORTH: So the purpose of
 14 the contract limit line then is to designate an
 15 area of responsibility?
 16 A. And authority.
 17 Q. And also to exclude responsibility and
 18 authority?
 19 A. Correct.
 20 Q. If it was the Sportsman's Warehouse
 21 team within the contract limits, then that kind of
 22 excludes the developer of Canyon Park, doesn't it?
 23 A. As long as you say kind of excludes,
 24 yes.
 25 Q. And there's some interaction?

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1 of Sportsman's Warehouse and its builders?
 2 MR. BROWN: Objection, calls for a legal
 3 conclusion.
 4 THE WITNESS: The contract has given
 5 authority from Sportsman's Warehouse to GA
 6 Architects and from Sportsman's Warehouse to Eckman
 7 Mitchell. They have the ultimate -- they,
 8 Sportsman's, have the ultimate responsibility, but
 9 they have delegated authority and responsibility to
 10 others. So that's the best I can answer your
 11 question.
 12 Q. BY MR. HEPWORTH: Well, you would
 13 agree that Sportsman's Warehouse and Eckman &
 14 Mitchell and GA Architects are all contracted with
 15 each other?
 16 A. Yes, they are.
 17 Q. And they -- let me back up.
 18 Are you aware of any contract between
 19 Sportsman's Warehouse and Canyon Park?
 20 A. I'm aware of a lease contract.
 21 Q. Are you aware of a contract between
 22 Eckman & Mitchell and Canyon Park?
 23 A. No.
 24 Q. Are you aware of a contract between
 25 Canyon Park and GA Architects?

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1 A. There is a great deal of interaction
 2 and there can be some exceptions, as we covered
 3 earlier this morning.
 4 Q. Right. Okay.
 5 A. And that's my definition of kind of.
 6 Q. And it's my understanding that Canyon
 7 Park was responsible to provide a pad-ready site?
 8 A. Yes.
 9 Q. Do you agree with that?
 10 A. Yes.
 11 Q. What is generally meant by a pad-ready
 12 site?
 13 A. It generally is a very broad term
 14 here, but if I were to be given that phrase, I
 15 would expect to see a site that is leveled, the
 16 subbase is in place and compacted, and the gravel
 17 base beneath the concrete slab were in place and
 18 compacted.
 19 Q. Have you looked at any documents to
 20 find out precisely what was done to provide a
 21 pad-ready site?
 22 A. I have seen the contract between
 23 Canyon Park and Stutzman, Inc. I don't remember
 24 the details of it.
 25 Q. Do you know if the site was compacted,

1 based on your review of the documents?

2 A. I'd have to go back and read them
3 again. I don't remember specifically.

4 Q. Do you know if a gravel base was put
5 down by Canyon Park?

6 A. Same answer. I expect it but I'd have
7 to verify it. And I'd be happy to take a minute if
8 you want to do that.

9 Q. Go ahead if you can do it quickly.

10 A. The contract -- there is no detailed
11 definition of their scope of work in there.
12 Compacted gravel is shown at the exterior of the
13 building under the curb and gutter under the
14 sidewalk, but I don't see any specific notes or
15 mention of it, either in their contract or in these
16 two pages prepared by EHM. Again, I would expect
17 it, but I can't verify it.

18 Q. At the location of the green plastic
19 valve box where this accident occurred, do you know
20 if that area was compacted and had gravel down?

21 A. That is specifically covered by a
22 section on one of the civil pages here and it calls
23 for compacted gravel.

24 Q. Do you have any reason to think that
25 it wasn't?

1 it. They called for that transition line to be
2 five feet outside the building, and so, no, I would
3 not expect that that was taken clear inside but
4 that the building contractor stubbed out five feet.
5 Oh, it wasn't -- I'm wrong on that.

6 It was not Canyon Park's contract to
7 John's Plumbing. It was -- let me find it. I
8 think it's Eckman Mitchell's. It is. It's Eckman
9 Mitchell to John's Plumbing and they were to
10 furnish and install the plumbing system, sewer,
11 water and gas stubbed out five feet.

12 Q. What does that mean?

13 A. That means that they ran all of the
14 piping inside and ran a bare pipe five feet out
15 beyond the building, which would allow another
16 contractor or someone else to come and connect to
17 it and actually deliver water, electricity, or
18 whatever it was.

19 Q. Okay. So --

20 MR. WILLIAMS: Excuse me, Jeff. Just so
21 I'm on the same page, what -- I was reading
22 something. What are we looking at here?

23 MR. HEPWORTH: These are the city plans.

24 MS. CANNON: Permit plans.

25 MR. HEPWORTH: Permit plans received April

1 A. I don't.

2 Q. I'm going to try to skip to where we
3 need to end up. Under the agreement Canyon Park
4 was to deliver water -- city water to the building,
5 correct?

6 A. Yes.

7 Q. And I believe on the plans that I have
8 there's a specific drawing that shows the main
9 waterline coming across what would be the -- I
10 believe that's -- the little W there in the bold
11 lines shows city water coming to the building?

12 A. Yes.

13 Q. And do you know if that occurred?

14 A. I don't know. I've seen a valve box
15 that would sit over a city water meter in the box.
16 I didn't take a wrench to remove it but my
17 assumption is that's the waterline and it's there.

18 Q. Is there a normal way of doing that?
19 And when I say that, I see a line that goes from
20 outside the contract line and it looks like it goes
21 to inside the building. Would that have been done
22 by Canyon Park?

23 A. There's a transition line there.
24 Canyon Park's contract to John's Plumbing called
25 for him to -- they called -- I'm going to look at

1 1, 2003, City of Twin Falls Building Department.

2 MR. WILLIAMS: These are the TJ Maxx?

3 MR. HEPWORTH: No. This is Sportsman's
4 Warehouse.

5 MR. WILLIAMS: Oh, this is Sportsman's.
6 Okay. I'm with you now.

7 MR. HEPWORTH: It's Canyon Park East?

8 THE WITNESS: And I'm not sure which one
9 that is. Where did the civil prints go? That
10 appears to be to equal page C-1 of the EHM drawings
11 based on what's on it.

12 MR. WILLIAMS: C-1?

13 Q. BY MR. HEPWORTH: And I don't know all
14 the documents that you referred to to find out who
15 did what with regard to that waterline. To what
16 documents do you refer to find out who did what?

17 A. Well, again, the contract with John's
18 Plumbing from Sportsman's Warehouse, and they
19 required their plumber to stub five feet outside
20 the building.

21 Q. Okay.

22 A. That means that somebody is going to
23 have to cross the contract limit line to connect to
24 that. And that's one of those transitions that I
25 talked about. The contract limit line says this is

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1 where our work goes but there's a lot of touching
2 and moving across it just to coordinate the work.
3 **Q. Right. And based on your knowledge of**
4 **the construction industry, do you have an**
5 **expectation as to what Canyon Park would have done**
6 **with regard to that water -- construction of that**
7 **waterline or connecting into that waterline?**
8 **A. They would have required -- I would**
9 **have expected them to require their contractor to**
10 **come in and make that connection.**
11 **Q. Would that be a plumbing contractor?**
12 **A. An underground contractor.**
13 **Q. Like Stutzman?**
14 **A. Like Stutzman.**
15 **Q. And I want to kind of get into how the**
16 **chronology works then. At what point in**
17 **construction does that waterline actually get put**
18 **into the pad? I assume it's below ground, right?**
19 **A. This one --**
20 **Q. Yes.**
21 **A. -- going in? It can happen at any**
22 **time from prior to the pad being built to just**
23 **before they open the door.**
24 **Q. Was it Canyon Park's responsibility to**
25 **get it to the contract line?**

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1 **Q. And was that city spec'd water meter**
2 **box used at the Sportsman's Warehouse site; do you**
3 **know?**
4 **A. I don't know.**
5 **Q. Did you look at that?**
6 **A. It looked right.**
7 **Q. Do you know if that's a concrete box**
8 **as opposed to, say, a dirt box?**
9 **A. It is concrete with a cast-iron lid.**
10 **Q. And it's designed for putting in**
11 **concrete or asphalt, correct?**
12 **A. Yes.**
13 **Q. And that box was properly used in that**
14 **application?**
15 **A. It appeared so to me.**
16 **Q. Now, I've seen the as-built plans that**
17 **Brad brought today and it shows a waterline leaving**
18 **the building out into the sidewalk area, correct?**
19 **A. Yes.**
20 **Q. And I hadn't seen that until yesterday**
21 **and today, but do you have any reason to dispute**
22 **that a waterline was taken from the building out to**
23 **the sidewalk?**
24 **A. I have no reason to dispute that.**
25 **Q. And that plan that we saw, the**

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1 **A. I would want to read that document**
2 **again of their lease agreement. I'm trying to**
3 **remember where that paragraph was that talks**
4 **about --**
5 **Q. Well, let me just ask you this, and**
6 **maybe I can phrase it this way. You've got to get**
7 **city water to the building --**
8 **A. Yes.**
9 **Q. -- right?**
10 **A. Yes.**
11 **Q. And I would assume that the Canyon**
12 **Park would take the waterline through the overall**
13 **development. And then, based on what you've**
14 **reviewed, it sounds like they would take it up to**
15 **the five-foot line from the building?**
16 **A. That is very definitely the norm.**
17 **Q. Okay. So that's getting water to the**
18 **building and Canyon Park's probable responsibility**
19 **was to get it to within five feet of the building,**
20 **the waterline?**
21 **A. Yes.**
22 **Q. And then in Twin Falls it's my**
23 **understanding that the city has a specific meter**
24 **box that they require all people to use?**
25 **A. Yes.**

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1 **as-built plan, that line that came from the**
2 **building out into the sidewalk was entirely within**
3 **the contract line of Sportsman's Warehouse,**
4 **correct?**
5 **A. Yes.**
6 **Q. Based on the fact that that waterline**
7 **went from the building out to the sidewalk within**
8 **the contract line of Sportsman's Warehouse, would**
9 **it be fair to believe that that probably was done**
10 **by Sportsman's Warehouse under their contract?**
11 **A. Their contract --**
12 **MR. BROWN: Objection, calls for**
13 **speculation.**
14 **THE WITNESS: Their contract required their**
15 **plumbing contractor to stub gas, water, and sewer**
16 **lines five feet out of the building, so it would be**
17 **normal to expect that, yes, that was included.**
18 **Q. BY MR. HEPWORTH: So if Eckman**
19 **Mitchell's subcontractor -- and I assume he must**
20 **have -- Eckman must have hired a plumber?**
21 **A. Yes.**
22 **Q. And they took a waterline from inside**
23 **the Sportsman's Warehouse building out and then**
24 **they ended it somewhere in the middle of that**
25 **sidewalk, as far as we know?**

1 A. At least five feet out, contractually.
 2 Where they ended it, we don't know.
 3 MR. WILLIAMS: I'll object to the sidewalk.
 4 There wasn't a sidewalk at the time.
 5 Q. BY MR. HEPWORTH: The waterline went
 6 about five feet or -- you know, I don't know how
 7 far out from the building --
 8 A. Yes.
 9 Q. -- true? And it went from the
 10 building out, correct?
 11 A. That was contractually required.
 12 Q. And then it -- based on what we've
 13 heard, it ended, that copper waterline ended?
 14 A. We don't know that it was copper. It
 15 just says that it was a one-inch line and we see
 16 that the subcontractor was required to place it out
 17 at least five feet out from the building. I can't
 18 testify as to the actual conditions.
 19 Q. And I'll represent to you that Blaine
 20 Pope testified that there was a copper waterline
 21 that he hooked his lines into.
 22 A. Okay.
 23 Q. And I just want to ask you -- I want
 24 to check on Blaine's testimony. Blaine said that
 25 it was illegal for him to cut the copper waterline

1 to know and understand there was a problem, to
 2 catch it, and see that it's corrected.
 3 Q. Well, that's what general contractors
 4 do. They're there to supervisor all the work and
 5 make sure no errors are made, right?
 6 MR. WILLIAMS: Objection, form.
 7 Q. BY MR. HEPWORTH: That's part of their
 8 duties?
 9 A. They have ultimate responsibility for
 10 the outcome of the project, and that is because
 11 they are there every day.
 12 Q. Well, but it's also they're the
 13 general contractor and they oversee all the
 14 subcontractors, right?
 15 A. Correct.
 16 Q. And the subs just are supposed to look
 17 over what that sub is supposed to do?
 18 A. Again, that's too general. I can't --
 19 a sub is responsible for his own work. He is also
 20 responsible to coordinate and correlate with those
 21 about him, and the general is to see that
 22 everything goes smoothly and correctly.
 23 Q. There are a lot of subs that are
 24 players, but there's only one general, right?
 25 A. Yes, typically.

1 that was installed by a plumber, legally he
 2 couldn't do that. Is that correct, do you think?
 3 A. I don't know of a regulation that
 4 would prohibit him there. I know of regulations
 5 regarding fire waterlines, but irrigation lines, I
 6 don't, no.
 7 Q. In the construction industry do
 8 subcontractors mess with other subcontractors'
 9 work, or is that frowned upon?
 10 A. Too broad of a question. I can't give
 11 you a straight answer to that.
 12 Q. If the plumbing contractor took the
 13 pipe out further than it was supposed to be, whose
 14 fault would that be?
 15 A. If there's no harm, nobody's fault.
 16 If there is harm, it's his, the plumbing contractor
 17 who put it out so far.
 18 Q. If the plumbing contractor extended
 19 that copper line from the building out, would you
 20 expect the general contractor to find that error
 21 if, in fact, there was an error? Would that be the
 22 general contractor's responsibility?
 23 A. I'm having a hard time picturing what
 24 the error could be. But if indeed there was an
 25 error, yes, I would expect the site superintendent

1 Q. And the general is going to have to
 2 watch over all the subs?
 3 A. Yes.
 4 Q. Do you have any reason to think that
 5 when the plumber put his line in, that he put the
 6 line in too long or too short?
 7 A. I have no reason to think anything
 8 about that.
 9 Q. In fact, have you seen any plan that
 10 tells the plumber how long of a line to put in?
 11 A. Not a plan, no.
 12 Q. Was there a bid in -- you saw the
 13 plumber's contract and it said he would take a
 14 waterline out from the building five feet?
 15 A. Yes.
 16 Q. And I'm guessing that this copper
 17 waterline was further out than five feet, based on
 18 where this accident -- where this valve box was?
 19 MR. WILLIAMS: Objection.
 20 THE WITNESS: It will have to be your
 21 guess.
 22 MR. WILLIAMS: Hold on. Object to the
 23 form. Misstates testimony. Go ahead.
 24 Q. BY MR. HEPWORTH: I don't think it
 25 misstates testimony. Mr. Pope testified, and I

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1 know you didn't see that, but he said he didn't
2 extend the copper waterline. He just hooked into
3 it. Do you have any reason to doubt it?
4 A. Not to doubt or believe it.
5 Q. Have you ever seen a plan that
6 delineated what Mr. Pope was supposed to do at that
7 waterline?
8 A. No.
9 Q. Have you ever seen a contract with
10 Mr. Pope that would indicate what Mr. Pope was
11 obligated to do?
12 MS. CANNON: With that waterline?
13 Q. BY MR. HEPWORTH: With that waterline.
14 A. Delineated what he was to do with that
15 waterline?
16 Q. Right.
17 A. No.
18 Q. Do you have any basis to say that
19 Mr. Pope did anything wrong in terms of hooking in
20 where he hooked in?
21 A. In terms of the connection to the
22 pipeline?
23 Q. Right.
24 A. No.
25 Q. Whose responsibility is it to identify

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1 vehicle by which those who are actually doing the
2 work get the details that were not shown in the
3 drawings or otherwise.
4 Q. Whose obligation is it to generate an
5 RFI, generally?
6 A. It's initially begun by the party
7 affected. The RFI goes from the contractor, the
8 general contractor, to the architect and then back.
9 Q. In the building industry do you try to
10 get everything in writing?
11 A. Yes.
12 Q. One way or another?
13 A. Yes.
14 Q. If the plans are silent, then you want
15 to document it with an RFI, correct?
16 A. We need clarity so that we can do the
17 work right.
18 Q. We want clarity so we're not here
19 doing these things, right?
20 A. That's correct.
21 Q. Mr. -- well, I won't talk about that.
22 Let's talk about --
23 MR. WILLIAMS: Jeff, do you mind if I take
24 a quick break?
25 (A recess was taken from 12:46 p.m.)

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1 for Mr. Pope where and how he's supposed to do his
2 job?
3 A. The person with whom he has contracted
4 that job.
5 Q. So if the general contractor, Eckman,
6 hired Mr. Pope, it would be Eckman's responsibility
7 to tell Mr. Pope what they wanted; is that correct?
8 MR. WILLIAMS: Objection, misstates the
9 facts.
10 THE WITNESS: It would be their
11 responsibility to see that he has accurate drawings
12 and/or information in some form, yes.
13 MR. WILLIAMS: Object to the form, lacks
14 foundation.
15 Q. BY MR. HEPWORTH: Are you aware of any
16 written document that determines where Mr. Pope was
17 supposed to put the green plastic valve cover?
18 A. No.
19 Q. Does that happen sometimes on
20 construction projects where the plans are silent on
21 a topic like that?
22 A. Every day.
23 Q. That's a common thing?
24 A. There's a document called an RFI,
25 which is a request for information, and it is the

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1 to 12:50 p.m.)
2 Q. BY MR. HEPWORTH: Let's keep talking
3 about that valve box. And the words design and
4 construction are used pretty loosely here. Are you
5 aware of any written design indicating, No. 1, the
6 location of that valve box?
7 A. No.
8 Q. Are you aware of any written
9 specification that specifically identifies what
10 valve box should be used in that specific location?
11 A. No.
12 Q. You are aware of general design specs
13 for valve boxes?
14 A. Yes.
15 Q. But that's just a general spec, right?
16 A. In my belief, yes, it is.
17 Q. And that box probably was used in
18 other locations in the landscaping area of that
19 project, true?
20 A. Probably.
21 Q. And there's also concrete boxes used
22 throughout that project, true?
23 A. Maybe.
24 Q. Well, the water meter box --
25 A. Yes.

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1 Q. -- in your opinion is a concrete box?
2 A. Yes.
3 Q. And then I don't know if you've seen
4 the little contract addendum that Mr. Pope had. I
5 think it's number -- it's a change order. I'm
6 sorry. I think it's No. 2. I'm going to hand
7 you -- it's contract change order No. 2 with
8 Mr. Pope's company, Idaho Scapes, but on page 2
9 just read that.
10 A. I've read it.
11 Q. On the second page it refers to a
12 concrete box installation or an asphalt box?
13 A. A concrete vault in roadway.
14 Q. And that's documented where a certain
15 type of box was specified, correct?
16 A. It documents that a certain kind of
17 box was used.
18 Q. And a change order, what is a change
19 order generally in the construction industry?
20 A. It's a document of understanding that
21 alters previous construction documents and contract
22 price and/or timing.
23 Q. Once again, you try to document
24 changes to the plans or the specs?
25 A. Yes.

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1 Q. I'll represent to you that Mr. Pope
2 testified that he put the valve box at the end of
3 the copper line and was specifically requested to
4 do that. And assuming that to be true, would you
5 be critical of Mr. Pope for doing what he was
6 specifically told to do?
7 A. I would withhold judgment until I
8 found out who told him to do it.
9 Q. It makes a difference?
10 A. Huge difference. If I told him to put
11 a flagpole in, I have no authority to say that, and
12 so it makes a large difference.
13 Q. Well, based upon the fact that that
14 valve box is within the contract limit of Eckman
15 Mitchell, is it kind of an assumption that he was
16 told to do that by Eckman Mitchell?
17 MR. WILLIAMS: Objection, assumes facts not
18 in evidence.
19 THE WITNESS: Not on my part, no.
20 Q. BY MR. HEPWORTH: You can't make any
21 assumption -- and the waterline is coming from the
22 building out that was specifically put there by --
23 you know that was ordered by Eckman Mitchell based
24 on the subcontract with the plumber, right?
25 A. Yes.

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1 Q. And then Mr. Pope put an irrigation
2 line at the end of that copper valve according to
3 Mr. Pope. Do you have any reason to doubt that?
4 A. No, I don't.
5 Q. And that's consistent with what facts
6 that we know?
7 A. Exactly.
8 Q. But just the fact that the copper line
9 was ordered by Eckman Mitchell, wouldn't it also be
10 consistent with Eckman Mitchell asking Mr. Pope to
11 cover the copper line?
12 MR. WILLIAMS: Objection, assumes facts not
13 in evidence.
14 THE WITNESS: No.
15 Q. BY MR. HEPWORTH: That's not
16 consistent?
17 A. That's too far of a leap.
18 Q. What more would you need to know to
19 determine who ordered it?
20 A. Well, daily logs might help or
21 personal testimony. And that's about the only
22 sources that I know of, because there's nothing in
23 the documents that I can find.
24 Q. So all we know for a fact is that the
25 plumber put the copper line in. We know for a fact

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1 that that was done at the request of Eckman
2 Mitchell, right?
3 A. We have logically deduced that based
4 on documents that we've seen.
5 Q. As you sit here today, you're not
6 willing to offer an opinion as to who ordered
7 Mr. Pope to do the work he did on that end of the
8 copper line?
9 A. No, I'm not.
10 Q. You don't know whether it's Canyon
11 Park, and you don't know whether it was Eckman
12 Mitchell?
13 A. No.
14 Q. You do know that it doesn't show up in
15 any of the plans or any documentation that you've
16 seen?
17 A. Not that I can find. Yes. That's
18 correct.
19 Q. And if that box -- that valve box was
20 to go in a planter box, that would be an
21 appropriate use of that valve box, true?
22 A. In my opinion, yes.
23 Q. It's only if Mr. Pope knew that that
24 valve box was going to be in the sidewalk, in the
25 concrete sidewalk, that it would have been

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1 inappropriate by Mr. Pope to put that valve box in
2 the sidewalk?
3 MR. WILLIAMS: Object to form.
4 THE WITNESS: You can restate the question
5 or I will.
6 Q. BY MR. HEPWORTH: Go ahead. It's
7 easier if you do. Explain yourself.
8 A. I lost it there for a minute. Tell me
9 which way we were headed, please.
10 Q. What I'm trying to get at is if
11 Mr. Pope knew that the valve box -- and assume that
12 he selected the valve box, the green plastic valve
13 box, if he thought that was going to go in
14 concrete, that was the wrong valve box. If he
15 thought that was to go into dirt, it's the right
16 valve box, true?
17 A. I do agree with that. And I would
18 think that a competent contractor, an experienced
19 competent contractor knowing the placement or the
20 surrounding materials on it would come to the same
21 conclusion.
22 Q. Okay. So you agree with that
23 statement?
24 A. I do agree with that.
25 Q. And as we sit here today, we really

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1 don't know what happened?
2 A. We don't.
3 Q. And we haven't seen any documentation
4 that tells us what happened?
5 A. Correct.
6 Q. You've offered the opinion that you
7 think the valve box settled and went down, correct?
8 A. Yes.
9 Q. And I want to explore your opinion on
10 that. Your opinion is based on what?
11 A. Examination of the photographs that I
12 have seen and experience in real life.
13 Q. The photographs show that the valve
14 box is not flush with the level of the sidewalk,
15 correct?
16 A. Yes, and that it is not parallel with
17 the surface of the sidewalk.
18 Q. Meaning what?
19 A. Meaning that the distance from the top
20 of the sidewalk plane to the top of the box from
21 one end to the other is not an equal amount.
22 Q. So in other words it tilts?
23 A. Yes.
24 Q. Is it possible that it tilts because
25 that's the way it was installed?

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1 MR. WILLIAMS: Objection, calls for
2 speculation.
3 THE WITNESS: No.
4 Q. BY MR. HEPWORTH: A contractor
5 couldn't install that on a tilt?
6 A. Could.
7 Q. It is possible then?
8 A. It is possible.
9 Q. But you have the opinion that whoever
10 installed -- well, let me back up. We better back
11 up to get to this tilt thing.
12 Let's get things into the sequence.
13 What Mr. Pope says is that when he installed the
14 valve box there was no concrete near where he put
15 the valve box. It was bare ground.
16 A. All right.
17 Q. He installs the valve box, right? And
18 he says it's almost unheard of for the level of the
19 valve box to not be adjusted when the concrete
20 sidewalk is poured. Do you agree with that?
21 MR. BROWN: Objection. I think it
22 misstates the testimony.
23 THE WITNESS: It's common for the
24 installing contractor to come back and adjust his
25 floor drain, his valve box, his -- whatever, his

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1 anchor bolts when the concrete line is established.
2 Q. BY MR. HEPWORTH: And I guess we'll
3 just have to ask about what is more typical. The
4 height of the green plastic valve box would need to
5 be equal and level to the city meter concrete box
6 because they're both adjacent to each other in the
7 sidewalk, right?
8 A. In a sloped plane, but yes.
9 Q. Do you think that when Mr. Pope
10 installed that green valve box that he had the
11 ability to install it in such a way that it would
12 not have to be adjusted when they later came in and
13 poured concrete for the sidewalk?
14 A. Perhaps. If the top of the foundation
15 line was established and if the top of the curb
16 line was established, yes, he would have had the
17 ability. If one or both of those were missing, it
18 would be his best guess.
19 Q. Is it unusual for the concrete
20 contractor to adjust the level of the boxes that
21 are installed in their sidewalks?
22 A. It is almost unheard of.
23 Q. For them to adjust the level --
24 A. Yes.
25 Q. So if I understand what you're saying

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1 is when Mr. Pope installed that valve box, he would
2 need to probably get a transit or something, some
3 sort of a device to determine the elevation of that
4 box?

5 A. Or a string stretched between those
6 two fixed points. What I'm saying is that when the
7 concrete guys are ready to pour, then the plumbers,
8 the electricians, the structural guys come back and
9 adjust their own inserts. The concrete guy doesn't
10 adjust them.

11 Q. Mr. Duke testified about using a
12 string line from the building out and that he
13 testified that he adjusted the boxes.

14 MR. WILLIAMS: Objection, misstates the
15 testimony.

16 MR. BROWN: Objection, misstates the
17 testimony.

18 MS. CANNON: He said he stretched the
19 string.

20 MR. WILLIAMS: How come I can't say what
21 people say and you can?

22 MR. HEPWORTH: Well, that's how I remember
23 it. Based on the reaction I think I'm wrong. I'm
24 not opposed to saying I'm wrong.

25 Q. BY MR. HEPWORTH: So tell me what your

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1 Q. And how about the city meter box, what
2 trade or who would have put that there?

3 A. Perhaps the plumber, perhaps an
4 underground contractor.

5 Q. Same thing then, if it's the trade's
6 responsibility, someone needs to contact the trade
7 to come in and set the level of their box?

8 A. That's an everyday occurrence in
9 construction projects.

10 Q. And if someone didn't contact the
11 trades, then whose fault would that be?

12 A. For not contacting them?

13 Q. Yes.

14 A. The general contractor.

15 Q. In your experience, though, typically
16 the elevation of those boxes put in sidewalks is
17 actually accomplished by the trades, not the
18 concrete contractor?

19 A. Yes.

20 Q. Have you ever seen a situation where
21 the concrete contractor would adjust the level of
22 the appliances, or whatever it is?

23 A. Yes.

24 Q. So that does happen on occasion?

25 A. Yes.

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1 memory of the deposition transcript was by
2 Mr. Duke. I believe it was Mr. Duke who did the
3 concrete work?

4 A. I don't remember that specific detail
5 on it.

6 Q. Is there a typical way it's done?

7 A. That that I have just described to
8 you. The grade will be brought to a rough grade
9 situation. If clear grade points can be
10 established, then the trades will set their inserts
11 and set them correctly the first time. If there
12 are no grade points established, then they have a
13 responsibility to come back at the day of the pour
14 or before when the grade is established and then
15 set those to the correct elevation. It is not the
16 concrete contractor's responsibility to adjust the
17 grade of others' inserts.

18 Q. Whose responsibility is it then to
19 notify what you call the trades? And I assume you
20 would include Mr. Pope as one of the trades?

21 A. Yes.

22 Q. And so someone would need to contact
23 him when they were ready to pour the sidewalk to
24 say come back in and reset it, right?

25 A. Yes.

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1 Q. And on occasion contractors make
2 errors?

3 A. Some. Yes. The answer is yes.

4 Q. And you agree that it's possible --
5 it's possible the concrete contractor is the one
6 that adjusted the level of the two boxes?

7 A. Yes, it is possible.

8 Q. And it's possible that when the
9 concrete contractor put in those two boxes, he did
10 it poorly?

11 A. It's possible.

12 Q. You don't know one way or another
13 because you weren't there to see it yourself,
14 right?

15 A. That's correct.

16 Q. And there isn't anything that you can
17 go back and examine today to make your own
18 determination as to whether it was done properly at
19 the time or not?

20 A. I don't agree with that.

21 Q. What can you do?

22 A. The photographs tell me a lot.

23 Q. Well, the photographs tell you that it
24 tilts?

25 A. The photographs tell me that it's

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1 settled.

2 **Q. The photographs tell you that it's**
3 **below the level of the grade of the sidewalk,**
4 **right?**

5 A. Yes.

6 **Q. But you've also agreed that it's**
7 **possible it was installed at the wrong level?**

8 A. No. You asked if it was possible for
9 an appliance like this to be installed. You didn't
10 ask if I felt this one had been installed
11 incorrectly.

12 **Q. I'm trying to find out why it is that**
13 **you're so firm that it was installed properly. The**
14 **only thing you've told me is you've seen**
15 **photographs that showed that it was below the level**
16 **that it should have been and it tilts. What else**
17 **are you relying on in offering the opinion that it**
18 **was installed properly to begin with?**

19 A. When I went out and looked at the
20 site, I looked not just at -- not for the box, but
21 I looked at the general installation of the
22 concrete. And my best opinion is that the concrete
23 contractor who put that in was a pure professional.
24 There are a lot of hints and details about that
25 from the condition of the surface to the edges of

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1 was used on that when the concrete was poured, and
2 then you see a dark space below it. The dark space
3 below it is concrete that has not been tooled. The
4 only thing it has touched is the plastic when it
5 was originally poured. I believe that the plastic
6 was up and level with that and then has settled,
7 thereby exposing the concrete below it that had
8 originally been in contact with it.

9 For this concrete to have been poured
10 on that kind of a slope and to have maintained the
11 integrity of the surface as far as a smooth plane
12 that we see there, he would have had to have
13 hand-formed a wedge shape -- it's actually a
14 compound wedge shape, because the southwest corner
15 is lower than the southeast corner, it appears to
16 be in this photograph. He would have had to have
17 created a compound wedge-shaped filler or form to
18 put on the top of this and then pour up to the edge
19 of it.

20 I know that, the radius, because it
21 has changed the texture of the concrete, the
22 surface texture of the concrete, you can't tell how
23 high the box was or was not within that, because
24 the steel of the radius going over that edge
25 changed it. But the area below it was originally

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1 the perimeter of the slab to the way the
2 construction joints were put in. It just bespeaks
3 a foreman and a crew who knew what they were doing
4 and who did it right.

5 **Q. Anything else?**

6 A. Yes. And so that's why I say do I
7 believe he could have adjusted the box, yes. That
8 workmanship looks like a guy who would do that.

9 Then when I look at the photographs,
10 three of them give me hints as to what went on that
11 day.

12 **Q. Good.**

13 A. These are not numbered.

14 MS. CANNON: I mistakenly left my copies,
15 so we'll enter these as exhibits.

16 (Exhibits *-003 through *-005 marked.)

17 **Q. BY MR. HEPWORTH: You explain. You go**
18 **ahead and walk us through them.**

19 A. If you look at photograph 3, this is
20 the best picture and evidence of the slope and the
21 tilt, the low end of the lid being closest to the
22 building, the high end being outboard.

23 On Exhibit *-004, the upper left-hand
24 picture, behind the traffic cone you can see a gray
25 surface that is the edge of the radius trowel that

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1 in contact with a form of some kind.

2 **Q. Now, how do you know that? How do you**
3 **know below the radius of the tooling that that was**
4 **in contact with the box?**

5 A. It was in contact with some kind of a
6 form.

7 **Q. And my question is how do you know**
8 **that?**

9 A. Because the surface texture of it has
10 changed, and the color shows.

11 **Q. Okay. It's changed from what to what?**

12 A. From gray, which is the surface you
13 see on the top and down the face of that concrete
14 that has been steeled or troweled, a steel trowel
15 has passed over it, down to the black that -- which
16 the surface has not been combined or amalgamated by
17 a trowel going over it. You're seeing pure
18 particles of cement which then become dark.

19 **Q. Let me just make sure. I mean, I**
20 **understand what you're talking about there's a**
21 **difference between where the edger -- what do you**
22 **call it?**

23 A. The radius -- an edger is fine.

24 **Q. The edger created a smooth surface on**
25 **the curvature of the lip, and then below the tool**

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1 mark it's rough where the tool obviously didn't
2 touch?
3 A. Uh-huh.
4 Q. So --
5 A. Except we don't know that it's rough.
6 It's just a different color.
7 Q. Well, the color difference is because
8 of the tool, correct?
9 A. Because of the tool has combined --
10 has mixed, if you will, on that surface.
11 Q. They didn't use a tool below where you
12 can see the edge of the tool ended?
13 A. Correct.
14 Q. But what made you think that the box
15 was above that tool mark?
16 A. To be able to pour concrete and to
17 maintain that kind of a distance of one inch above
18 a form and get that clean of a tool joint on it in
19 the middle of a slab just can't be done.
20 Q. Okay. I'm not following you.
21 A. So there was a form -- see, this
22 concrete now is free floating. It's higher than a
23 form surface or a containing surface. Something
24 had to have contained that, because concrete in its
25 ready-mix state at a four-inch slump is not going

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1 to stand one inch high and allow you to put that
2 clean of a radius on it.
3 Something was there. It either was
4 that box up in its proper position, or it was some
5 kind of a form that held the concrete back, because
6 the concrete will not self-stand on its own. The
7 labor involved to create that form to allow the box
8 not to be up to level, a fast guess, is going to
9 cost you \$300. The labor to relocate that box to
10 the correct location, seven to ten dollars.
11 Q. I'm not following that. I'm sorry.
12 A. That's okay. If I were Scott Duke and
13 I came to this situation and the box were low, I
14 have to put my sidewalk at a clean smooth plane.
15 Q. Right.
16 A. So I know that my concrete is going to
17 slop over on the top of that box unless I can
18 somehow contain it and hold it out. I can either
19 raise the box or see that somebody raises it to its
20 proper elevation and then pour right up against it
21 as a screed, or I can create an artificial form
22 that fits over the top of it that will hold the
23 concrete back, and then when I'm done, I'll take it
24 off. The labor cost to raise the box as compared
25 to the labor cost to create a form to hold that

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1 concrete back is a staggering difference.
2 The third photograph is Exhibit *-005.
3 Assuming that the writing on the top of the box
4 that says irrigation cover valve is readable and
5 it's right side up, then the lower left-hand corner
6 of that photograph where the lid is, you can see
7 where the edge of the tool, the radius tool has
8 come down and then there is space down below that.
9 At the very bottom of that radius tool there is a
10 small horizontal lip, with a small lip that comes
11 out on it that comes when the tool --
12 Q. Can you mark that on the photo, since
13 it's an exhibit, just circle it. You've put --
14 A. I've put an arrow that points to that
15 lip.
16 Q. And that lip shows what?
17 A. That lip shows where the tool has
18 passed by. If I could draw on the back of this --
19 Q. Great.
20 A. The form in this case is represented
21 by a rectangle with an X through it. I have
22 exaggerated the proportions of things, but I will
23 label the radius that is done by -- created by the
24 tool moving around it, the shelf that is a very
25 narrow small space at the bottom of the radius

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1 tool, and a circle around the lip. And that is
2 just a piece of small concrete that has floated out
3 from underneath the tool at the edge of the shelf,
4 which indicates to me that there was a form there
5 to catch and receive that. There was something
6 solid to hold it there.
7 And when -- now, in this case, of
8 course, I've drawn like a two-by-four or something.
9 But when this -- and I believe it is the box when
10 it settled -- it came down to the dashed line that
11 I've drawn across there and leaves that lip --
12 Q. Would you write the word box on the
13 opposite side of the form, right, that's where the
14 box would be?
15 A. Yes.
16 Q. When the concrete is poured you had
17 the box there, you put a form around the box, and
18 the concrete is poured up to the form?
19 A. Yes.
20 Q. And then, what, the form is pulled
21 out?
22 A. Back up. Maybe I misunderstood. The
23 box is there, and you pour concrete up to the box.
24 Q. You keep saying there's a form and you
25 said that you denoted that by the X, right?

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1 A. I did. Let me change that because
2 that's confusing. There's the box, there's the
3 lid, and I've taken that out.
4 Q. So why did you take the form out?
5 A. Because it was confusing you.
6 Q. I'm not confused at all. I know that
7 you drew in a form and you drew it on the diagram,
8 and now you're saying I'm taking it out.
9 A. I illustrated -- I verbally
10 illustrated in a poor way.
11 Q. That's fine. I'm not trying -- you're
12 the one that drew it.
13 A. Yes, I am.
14 Q. My only question is is there a form
15 between the concrete and the box?
16 A. No.
17 Q. Tell me how they constructed it then.
18 You started telling me that there's a form, and now
19 I'm totally confused because you say there's no
20 form.
21 MS. CANNON: He said there was one of two
22 options, one being a form.
23 Q. BY MR. HEPWORTH: Tell me how this got
24 poured without a form.
25 A. The box was up at the correct

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1 up to this point and they reached out. I don't
2 know.
3 Q. The other point is this crack that
4 goes on the edge of the water meter box and on the
5 edge of the valve box, that seems to be a form
6 line, right?
7 A. Either that or a control joint. We
8 don't know.
9 Q. Well, it might be a form?
10 A. It could have been.
11 Q. And they could attach that valve box
12 to the form, true?
13 A. No.
14 Q. You said earlier that the way they
15 could have constructed this was with the use of a
16 form. Do you disagree with that now?
17 A. No. I don't disagree with that as
18 long as we have an understanding. I'm saying that
19 you could have filled in this space on top of the
20 plastic box with a form to hold the concrete back
21 and allow the box to be below grade. But that it
22 would be a dumb way to do it.
23 Q. Well, all I'm going on is what you
24 tell me, and you started off by saying they used a
25 form?

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1 elevation, and the box was used as a form or as a
2 stop.
3 Q. Okay. Let's talk about that. So
4 you've got the box out there in the middle of
5 nowhere, basically?
6 A. Yes.
7 Q. Then you pour concrete up to it,
8 right?
9 A. Yes. That's correct.
10 Q. And then in order to use the tool to
11 finish the edge around the box, somebody has to go
12 out into the concrete with a tool and edge around
13 it?
14 A. Yes. That's right.
15 Q. How do they do that without stepping
16 in the wet concrete?
17 A. Oh, they could put a plank from there
18 out, or they could wait until the concrete is firm
19 enough that you can walk on it and then trowel your
20 tracks out as you leave.
21 Q. You can see from the photos that that
22 valve box is out in the middle -- you can't reach
23 it from the curb line?
24 A. Well, perhaps there was a construction
25 line on one side or the other that they only poured

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1 MS. CANNON: Objection. Mischaracterizes
2 it.
3 MR. HEPWORTH: He drew it on the diagram,
4 so I don't think I'm mischaracterizing anything.
5 THE WITNESS: That was misleading on my
6 part, and I didn't mean to do that, Jeff. The
7 diagram that I want you to rely on is the one that
8 more clearly shows the box. My belief is that the
9 box is -- was up to grade --
10 Q. BY MR. HEPWORTH: I know what your
11 opinion is, but I want to know about how it was
12 actually done.
13 A. Okay.
14 MR. WILLIAMS: Maybe I can short-circuit.
15 This not a proper objection, but Scott Duke said,
16 and you've got his deposition there, he said he
17 used control joints. We can go look right at it.
18 MR. HEPWORTH: I appreciate your trying to
19 help out, but I'm asking him questions.
20 MR. WILLIAMS: Sure. But we don't need to
21 speculate where we know --
22 MR. HEPWORTH: I think that's a pretty good
23 point.
24 Q. BY MR. HEPWORTH: Do you know how they
25 constructed the concrete around the valve box, how

1 they actually poured the concrete?
 2 A. Only by the evidence that I see in the
 3 photographs.
 4 Q. Do you know if they constructed that
 5 valve box using forms or not?
 6 A. There were no forms around the
 7 perimeter of the valve box.
 8 Q. How do you know that?
 9 A. Because I see that the concrete is
 10 tight up to it.
 11 Q. Well, it doesn't appear that it's
 12 tight up to me.
 13 MS. CANNON: You asked for his opinion and
 14 he gave it.
 15 MR. HEPWORTH: I think I'm entitled to
 16 challenge it.
 17 THE WITNESS: Please do.
 18 Q. BY MR. HEPWORTH: You can see a space
 19 between the valve box and the concrete right here,
 20 right?
 21 A. No.
 22 Q. That's not a space?
 23 A. That's not a valve box. That's a lid.
 24 Q. The lid to the valve box. There is a
 25 space --

1 A. There is a space between the edge of
 2 the lid and the concrete. There is not a space
 3 between the valve box and the concrete.
 4 Q. You're relying just on your looking at
 5 the photos, right, because you didn't see it?
 6 A. That's correct. I didn't see it.
 7 Only on personal experience and the photographs.
 8 That's correct.
 9 Q. And you don't know whether that
 10 concrete line is a control joint or where the forms
 11 went?
 12 A. I do not. I see that the concrete is
 13 a different color here, and so something -- that
 14 would suggest to me that this slab was a different
 15 batch of concrete than this slab. And that's not
 16 uncommon, which would make it very easy for the
 17 tradesman to reach out and work that joint.
 18 Q. You have come to the conclusion that
 19 Scott Duke was a very competent concrete
 20 contractor?
 21 A. Yes.
 22 Q. Given that opinion and your prior
 23 testimony that the water meter box appears to be a
 24 concrete box and the green plastic valve box is not
 25 a concrete box, shouldn't he have noticed that he

1 had two different types of boxes?
 2 MR. WILLIAMS: Calls for speculation.
 3 THE WITNESS: I'm sure that he did notice.
 4 Q. BY MR. HEPWORTH: Shouldn't that have
 5 been a red flag --
 6 MR. WILLIAMS: Objection.
 7 Q. BY MR. HEPWORTH: -- to a competent
 8 good concrete contractor?
 9 MR. WILLIAMS: Object to the form. Calls
 10 for speculation.
 11 THE WITNESS: If my crew had been pouring
 12 that, I would have expected them to say something.
 13 I can't speak for Scott.
 14 Q. BY MR. HEPWORTH: All right. I'm
 15 almost done.
 16 General contractors make errors and
 17 don't find errors at times; do you agree with that?
 18 A. Yes, I do.
 19 Q. Have you ever been on a project where
 20 you didn't have a punch list?
 21 A. No.
 22 Q. Almost always a punch list where
 23 there's little details that got missed, and the
 24 owner points it out to the contractor, right?
 25 A. The architect points it out.

1 Q. Somebody points it out?
 2 A. Somebody points it out.
 3 Q. And I've seen punch lists that are
 4 hundreds of items long. Have you?
 5 A. Yes.
 6 Q. And when the project superintendent
 7 said I came back to the job a year later and I
 8 didn't see this, therefore, it wasn't there, is
 9 that very compelling to you?
 10 A. No.
 11 MR. HEPWORTH: That's all I have.
 12 (A recess was taken from 1:26 p.m. to
 13 1:32 p.m.)
 14
 15 EXAMINATION
 16 BY MS. CANNON:
 17 Q. I will try to make this brief, so my
 18 questions will likely be a bit disjointed, and I
 19 apologize ahead of time.
 20 Earlier there was a line of
 21 questioning, and I don't remember if it was came
 22 from Jeremy or Brad, as to who, if anyone, Blaine
 23 Pope should have contacted upon his return to the
 24 site when he observed that the irrigation box was
 25 surrounded with concrete rather than in a dirt

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1 planter as he had anticipated. Do you have an
2 opinion as to who, if anyone, he should have
3 contacted, if anyone at all?

4 A. Any concerns he had should have been
5 conveyed to the owner or the owner's
6 representative. I'm assuming the owner had a
7 construction manager that they were relying on. It
8 should have been to him or her.

9 Q. Now, regarding that you have mentioned
10 a couple of times a chain of communication. I
11 don't know that that's your exact phrase. That's
12 my paraphrase. Could you explain to me in a
13 situation like this what you mean when you say
14 there is a certain communication process or a
15 certain way communications are to be done in these
16 type of jobs?

17 A. There is a real ability --
18 availability of persons in authority to hear stupid
19 things from persons who are not in authority. For
20 instance, it is common for an owner to walk a
21 project, churches, schools, offices, it doesn't
22 make any difference -- and one of the tradesman not
23 knowing who this individual is will be asked, what
24 is that that you're doing, what are you installing.
25 And they will say this is the stupidest most

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1 not read it in the contracts that I have gone
2 through. I did not read the 1997-A201. That would
3 be the first place I would look.

4 Q. And perhaps I misunderstood. I
5 thought you said on this project the general
6 contractor was not to talk to the owner. Did I
7 misunderstand?

8 A. I didn't make it specific to this
9 project. I just was saying that's typical in the
10 chain of command or communication.

11 Q. Given these typical chains of
12 communication, if the concern is raised through
13 this channel and ultimately the architect does not
14 act on that concern, do you have any opinion on
15 that?

16 A. As to what would happen?

17 Q. Yes.

18 A. Unless there's an accident or a
19 catastrophe of some kind, nothing would happen. It
20 is -- the architect has the authority to speak on
21 behalf of the owner in most cases, and what he
22 decides or she decides is the answer.

23 Q. Earlier you were looking at one of
24 these larger plans that Brad brought that detailed
25 the waterline coming into and going out from the

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1 upside-down heating system, lighting system,
2 whatever else; if I had been allowed to design it
3 -- and so contractually -- and, of course, he
4 doesn't know what he's talking about. He doesn't
5 have the whole picture.

6 So contractually tradesmen can talk to
7 their foremen and/or their boss. The subcontractor
8 can talk to the general contractor but not the
9 architect. The architect can -- the general
10 contractor can talk to the architect. In some
11 situations such as this one, the general contractor
12 is not to talk to the owner, but that is taken care
13 by the architect. And information comes back down
14 the same way.

15 The RFI that I talked about earlier
16 really starts down where the rubber meets the road
17 and works its way up, and the information comes
18 back down. It is a tedious process, but it brings
19 clarity.

20 Q. You said in some cases specifically
21 such as this one. Do you recall where you received
22 information specific to this chain of communication
23 on this project?

24 A. I don't know that I know specifically
25 the chain of communication on this project. I have

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1 front of the building that we've been describing.
2 Do you recall that?

3 A. Yes, I do.

4 Q. And he was questioning you regarding
5 the notations that were directed to those
6 waterlines. And I believe that the two of you had
7 an ongoing conversation about field verify, that
8 phrase. Do you recall that?

9 A. Yes.

10 Q. Is it your testimony then today that
11 even on an as-built set of plans such as the ones
12 we were looking at not everything on those plans
13 might be exactly precise as to location and scale?

14 A. Not as regards as-builts, no. That's
15 why they call them that.

16 Q. And so do you recall if that
17 particular page we were looking at was an as-built
18 where it said field verify those two waterlines?

19 A. We'd have to go back and look.

20 Q. You would not expect to see that on an
21 as-built?

22 A. I would not.

23 Q. Earlier I believe it was Brad that
24 walked you through some portions of Mr. Anderson's
25 deposition. One portion in particular that he read

1 at least part of was on pages 46 and 47. Can you
2 turn to that, please.
3 A. All right.
4 Q. Starting at line 9 of 46 and reading
5 through, I'll say, line 8 of 47, will you just read
6 that to yourself, and then I'll ask you a few
7 questions about that.
8 MR. WILLIAMS: 46, line --
9 MS. CANNON: 46, line 9, through 47, line 9
10 again.
11 THE WITNESS: All right.
12 Q. BY MS. CANNON: Just for the record
13 would you describe briefly what Mr. Anderson's
14 testimony on those two pages that I've referenced
15 is regarding?
16 A. It's regarding the -- I just want to
17 make sure. It's regarding the two valve irrigation
18 meter, whatever they're called, boxes that are
19 placed in the sidewalk on the north side of the
20 building.
21 Q. And specifically would you read out
22 loud -- well, let me read to you the first question
23 posed to Mr. Anderson. And I'll start reading page
24 46, line 9, and then if you could read his answer
25 to that question.

1 A. All right.
2 Q. "Do you remember if you noticed the
3 two boxes in the sidewalk and presumably had this
4 conversation about -- is there a reason these are
5 here or not. Did you have any conversations with
6 your mechanical engineer who helped you with these
7 plans about those boxes and whether their placement
8 was appropriate in the engineer's opinion?
9 A. "I would not have done that because
10 that's outside our scope of work. In this case the
11 boxes were provided by the developer, which was
12 outside of our scope. The fact that they're behind
13 the sidewalk, that's within our scope. So why are
14 they putting these inside our scope of work? I
15 would have thought they would have been outside of
16 it. And the decision was made by somebody, this is
17 where we want them, this is what we're going to do.
18 Okay. We're going to -- well, we're going to have
19 to work around it, or Eckman is going to have to
20 work around it. We do this largely on a
21 design-build basis, so it's done as a team."
22 Q. Based on your understanding of this
23 project and the understanding that you've already
24 testified to regarding what an architect's
25 responsibility is in a job such as this, do you

1 have any opinion as to Mr. Anderson's answer, as
2 you understand it, from this testimony?
3 A. That it is lax.
4 Q. Could you explain what you mean by
5 that?
6 A. He had a question on the installation
7 of a component of his project, and it was enough
8 that he -- was serious enough that he remembered it
9 at the time of this deposition. He testified that
10 he asked himself about it as to why it was that
11 way. It was not normal. It was not what he
12 expected. But he said, well, we're going to have
13 to work around it. That is a lax and lazy answer.
14 (Exhibit *-006 marked.)
15 Q. BY MS. CANNON: Would you please
16 indicate what Exhibit *-006 is for the record.
17 A. It's an AIA document, B141-1997. It
18 is a standard form of agreement between owner and
19 architect with a standard form of architect's
20 services.
21 Q. Have you reviewed this document prior
22 to today?
23 A. Yes.
24 Q. What does this document entail in
25 laymen's terms?

1 A. The responsibility and authority of
2 the architect granted by the owner for this
3 specific project.
4 Q. Is this the contract between GA
5 Architects and Enterprise Investments, which we've
6 been informed is Sportsman's Warehouse?
7 A. Yes, it is.
8 Q. Is there anything --
9 MR. BROWN: I'm going to object. I don't
10 know if anyone's made that --
11 MS. CANNON: And I will agree with that. I
12 believe that was just the representation made by
13 Brad earlier. But I'll agree that that's all it is
14 just for today's purposes.
15 Q. BY MS. CANNON: Who is the signatories
16 of this document -- who are?
17 A. Glenn W. Anderson, architect, and
18 Stuart B. Utgaard, CEO, of the owner.
19 Q. If you --
20 MR. BROWN: Nicole, if you're going to
21 continue on this questioning, I would like to take
22 a break so I can get my copy of it or if you have a
23 copy you could provide us.
24 MS. CANNON: Sorry. I thought you had
25 them.

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1 MR. WILLIAMS: Did you get that from us or
2 on your own?

3 MS. CANNON: Sportsman's is what I'm
4 assuming.

5 Q. BY MS. CANNON: Mr. Arrington, is
6 there anything in your review of this specific
7 contract that changes the opinion you expressed
8 earlier with regard to Mr. Anderson's
9 responsibilities when he noticed the valve box in
10 question?

11 A. It doesn't change my response. In
12 fact, it amplifies or supports it.

13 Q. In your years of experience on similar
14 type of projects, can you say whether or not it is
15 unusual to have a line for irrigation water run
16 from inside of a building to the outside points
17 where it might be connected and used?

18 A. It's common.

19 Q. Common. Similarly, I believe earlier
20 you testified that it might be typical for a
21 subcontractor such as Idaho Scapes, Inc., to review
22 plans as far as placement of different irrigation
23 systems; is that correct?

24 A. Yes.

25 Q. In your experience have you ever

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1 Q. Or this morning, actually.

2 A. Or this morning.

3 Q. Other than that. Other than when I
4 showed it to you earlier?

5 A. No. Not until this morning, no.

6 Because the price of 1,815 is the one that rings a
7 bell. Well, Nikki, the one that we looked at had
8 the note on the second page. I may have mixed it
9 up.

10 Q. This is Exhibit *-002. Yes. Haven't
11 got there yet.

12 A. Okay.

13 Q. Can you just tell me based on your
14 however many years of experience -- and we won't
15 say that again -- what does your review of the
16 first page of yesterday's Deposition Exhibit *-001
17 suggest to you that that is?

18 A. This appears to be a bid or a proposal
19 price from someone to Sportsman's Warehouse for the
20 installation of sprinkler and landscaping.

21 Q. And if I indicated to you that
22 Mr. Pope testified that he drew up that bid for
23 work on the three elevated planters that we've been
24 discussing that were actually placed in front of
25 the Sportsman's Warehouse store, would you have any

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1 encountered situations where a landscaper such as
2 Idaho Scapes would be given, say, measurements
3 instead and a general description of what is
4 expected and then they're allowed to work on their
5 experience and knowledge as far as we need four
6 bubblers here and nine over here or things of that
7 nature?

8 A. Yes. That would be common. But the
9 major issue points such as the connection of the
10 water and the source of the electrical power and
11 the placement of the timer box and the anti-syphon
12 valves and those sorts of things would be
13 specified.

14 Q. I will hand you a document that I'll
15 indicate was our Exhibit *-001 from yesterday's
16 deposition that none of us had seen prior to
17 yesterday, that being brought to the deposition by
18 Blaine Pope. I'll tell you that he indicated he
19 had located a file pertaining to this job site and
20 that two-page Exhibit *-001 was within that file.

21 Have you seen that document before?

22 A. I have.

23 Q. You have?

24 A. I think I have. Is this the one that
25 you and I looked at yesterday?

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1 reason to dispute that testimony?

2 A. No. The price seems right. The
3 quantities seem right. I would not dispute it.

4 Q. There was discussion earlier regarding
5 whose responsibility, if any, it might be to notify
6 the workers on the grounds of changes that may be
7 made to a building plan?

8 A. Yes.

9 Q. I'll hazard a guess that if those
10 changes are within the contract limit lines --
11 well, I won't. If those changes are within the
12 contract limit lines, typically whose
13 responsibility is it to actually notify the workers
14 on the ground of those changes?

15 A. It begins with the project
16 superintendent, however he receives the
17 information. He then would give it to the --
18 either the foreman of each of the trades crews or
19 to their owner, to whoever their communicated
20 representative is from each company. And then the
21 foreman or the owner would give it to the men with
22 the hammers in their hands.

23 Q. Would that responsibility extend to
24 someone doing work within the contract limit line
25 even if that person, for the sake of argument, were

1 doing that work not directly -- how do I want to
2 say that?
3 A. Outside the contract?
4 Q. Yes.
5 A. If there was any implication,
6 connection, or transition involved.
7 Q. Can you explain to me what you mean by
8 that.
9 A. If you were going to paint a red dot
10 on the sidewalk when I'm all done and at the last
11 minute that gets changed to a blue dot on the
12 sidewalk, it doesn't matter to anyone else if it's
13 red, blue, pink, green. So I wouldn't worry about
14 the communication on that because it doesn't
15 implicate anything else.
16 But if you were asked to put six
17 inches of gravel below that same sidewalk and you
18 had originally been told to put four inches, then I
19 would make certain that I communicated with you and
20 with the concrete contractor and with other trades
21 who were moving past that sidewalk to know that
22 there's going to be a delay. Anyone that
23 transitions to it or correlates with it or connects
24 to it or is implicated by it.
25 MS. CANNON: Let me just take one moment to

1 entered, the AIA document A201, that if they had
2 intended a design-build contract, there are a
3 family of design-build contracts promulgated by
4 AIA, are there not?
5 A. Yes, there are.
6 Q. You can get those on their Web site.
7 There's a whole family of design-build contracts,
8 true?
9 A. That's exactly right.
10 Q. When we talk about a team, that word
11 has been somewhat loosely thrown around, a
12 design-build team. The fact is the architect's
13 contract is separately with Sportsman's, correct?
14 A. Yes.
15 Q. So from that point of view the
16 architect is not contractually part of a team with
17 Eckman Mitchell designing this?
18 A. It's not.
19 Q. The question about -- I'll just say
20 Jeff asked about whether there was anything
21 written, any documentation telling Blaine Pope
22 where to put the valve box. You recall those
23 questions?
24 A. I do.
25 Q. Let me just get this out one more

1 review my notes.
2 Q. BY MS. CANNON: Have you talked to
3 Blaine Pope regarding this matter?
4 A. No.
5 Q. You've already indicated, I believe,
6 that you have not had time to fully read the lease
7 that was presented to you by either one of these
8 gentlemen, and by that I mean the lease between
9 Canyon Park and Sportsman's Warehouse?
10 A. I have not fully reviewed it.
11 MS. CANNON: I think at this time I don't
12 have any further questions.
13
14 FURTHER EXAMINATION
15 BY MR. WILLIAMS:
16 Q. I just have a few follow-up. I'll try
17 to be brief. On the design-build questions
18 Mr. Hepworth asked a moment ago, I don't know if
19 it's -- I think your testimony is fairly clear on
20 this point that this was not a design-build
21 contract between Sportsman's and Eckman Mitchell?
22 A. Yes. That's right, based on the
23 contracts and not relying on the testimony of some
24 of the deposed.
25 Q. Right. And the contracts that were

1 time. Okay. Let me identify this for the record.
2 This is sheet C-1 of 2 prepared by EHM Engineers,
3 date 3-27-03. I think we've looked at a different
4 version of this. Nikki was asking you -- maybe
5 Jeff -- questions dated somewhat earlier than 3-27.
6 Do you recall?
7 MS. CANNON: I think it was 3-31.
8 Q. BY MR. WILLIAMS: In any event, for
9 purposes of my question this document does show
10 some planters here. Can you see those?
11 A. I can see some contoured shapes
12 without an identifying label on them, but they
13 certainly could be that.
14 Q. Those planters obviously were not put
15 in at the time that Eckman Mitchell completed its
16 construction. Then I think you can see the three
17 planters that were put in right here. I'm pointing
18 to them.
19 A. That's what they appear to be, yes.
20 MR. HEPWORTH: In the middle of the
21 building.
22 Q. BY MR. WILLIAMS: In the middle of the
23 building. Now, what is this line here? Is this
24 the irrigation line that goes out past the concrete
25 limit, down in front of the entry, and then out?

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1 A. No.
2 Q. What is that?
3 A. That is two-and-a-half-inch water
4 service into the building with a meter.
5 Q. Okay. Is that where that meter box is
6 there?
7 A. That's where I would expect it to be,
8 yes.
9 Q. Yeah. I think we're talking about the
10 same thing. There is a line that goes through
11 there?
12 A. There's a box there that suggests
13 there's a line there. This calls for it. So
14 without looking underground, yeah, I would expect
15 to find it there.
16 Q. Now, I don't know specifically, I
17 think Mr. Anderson testified that the city people
18 put in the city meter box. I could be wrong about
19 that.
20 A. I don't know.
21 Q. In any event, Eckman Mitchell didn't
22 put in the city meter box?
23 A. That's typical in the city of Twin
24 Falls, so it's very believable to me.
25 Q. So other people are doing work within

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1 should he have put that green box?
2 MS. CANNON: Objection. Calls for
3 speculation.
4 Q. BY MR. WILLIAMS: Well, within this
5 planter box?
6 A. You're asking where I would put it?
7 Q. Where should he have put it. If these
8 are the plans he's looking at, he knows he's got to
9 put a box in there. Do you see this little
10 rectangle in there?
11 A. I do.
12 Q. What do you suppose that is intended
13 to represent?
14 A. I have no idea.
15 Q. Would you think it's speculation to
16 suggest it might be an irrigation box?
17 A. No. It's too large.
18 Q. Okay. Well, in any event, it's a
19 planter box that wasn't put in, and Mr. Pope
20 thought he was supposed to put the green box in the
21 planter box. Okay. That much we do know.
22 A. Is that a question?
23 Q. He said he thought he was going to put
24 it in a planter box, right?
25 MR. BROWN: I think that does misstate his

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1 Eckman Mitchell's contract limit line, right?
2 A. Yes.
3 Q. That's beyond the scope of their work
4 for Sportsman's Warehouse?
5 A. Yes.
6 Q. And Blaine Pope testified in his
7 affidavit and his deposition he thought that green
8 box was going to be used in a planter.
9 A. Okay.
10 Q. And it would have been okay for a dirt
11 application. Looking at this -- and I have his
12 affidavit -- he said the plans show -- paragraph 3,
13 when Idaho Scapes was on site the building pad had
14 been excavated and compacted, but no building had
15 been built and no sidewalks had been built. The
16 plans called for a planter box.
17 Now, he couldn't remember what he saw,
18 what he was referring to, but should he have been
19 provided a copy of plans that showed him where to
20 put his box?
21 A. He, Blaine Pope?
22 Q. Blaine Pope.
23 A. Yes, he should have.
24 Q. And if he had been given this set of
25 plans, these are the plans he's referring to, where

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1 testimony. I think he said --
2 Q. BY MR. WILLIAMS: I was asked to
3 install a valve box in a location where the planter
4 box was to be constructed by another contractor.
5 Okay? He thought it was going into a planter box.
6 Now, if he had this, would this tell him where to
7 put the green box?
8 A. No.
9 Q. Why not?
10 A. It would have inferred. It would have
11 helped him to know where to question and ask about
12 it, but it doesn't tell anything. The lettering is
13 a tell. The dimensions are a tell. Shapes are a
14 suggestion.
15 Q. So this planter box does not have
16 exact feet is what you're saying, so he wouldn't
17 know exactly?
18 A. It does not have a label that says
19 this is a planter box.
20 Q. Now, the planter box -- the green
21 valve box actually is about 18 to 20 feet away from
22 the building --
23 A. All right.
24 Q. -- according to Ray. This planter
25 box -- or the one that's in there now goes out

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1 about 10 feet, I believe, 10 to 12 feet.
 2 A. Okay.
 3 Q. Clearly, he's out -- whether -- the
 4 current box, he's missed that planter box by 8, 10
 5 feet?
 6 MS. CANNON: Objection, irrelevant as far
 7 as the current planter box having anything to do
 8 with the --
 9 MR. WILLIAMS: That's fair.
 10 Q. BY MR. WILLIAMS: You can see -- you
 11 can measure that and get some idea. This is five
 12 eight, you can read that --
 13 A. What's the scale? It doesn't show.
 14 Q. We can measure this. But you can
 15 figure out --
 16 A. If this is 24 feet and that's just
 17 under an inch, this is about a 1 to 30 scale. So
 18 15 feet would be a half inch, which would be about
 19 the base of that W.
 20 Q. So there was a miscommunication
 21 somewhere. A planter box was originally thought
 22 of, that was changed. But somebody didn't tell
 23 Pope that we're not going to do these. We'll
 24 figure that out later. But even assuming they were
 25 going to do it, he didn't put it in the right

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1 location of the green valve box before he put it
 2 in?
 3 A. Yes, he did.
 4 Q. He failed in doing that, did he not?
 5 A. I don't know. I was gone that day.
 6 Q. And I think there's been suggestion
 7 back and forth in the questions that there's some
 8 question of who he was contracted with. I don't
 9 think that it's serious, but if it is, is your
 10 answer that the person he was contracting to do the
 11 work for should have ensured that he did it
 12 properly?
 13 A. Yes.
 14 Q. And if that's Canyon Park that he's
 15 contracting with, they should have ensured he did
 16 it in a proper location?
 17 A. Yes.
 18 Q. And if there was a change and no
 19 planters were used and it shouldn't go in there at
 20 all, Canyon Park should have confirmed that, true?
 21 MS. CANNON: Objection.
 22 THE WITNESS: Too many ifs on that. I
 23 don't know.
 24 Q. BY MR. WILLIAMS: We've looked at
 25 Mr. Pope's contract with Canyon Park to do

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1 place?
 2 MS. CANNON: Objection.
 3 MR. HEPWORTH: Object to the form of the
 4 question. Calls for speculation.
 5 THE WITNESS: I don't know that that's a
 6 question. No. 2, you're asking me things that are
 7 based solely on your statements. That looks like a
 8 planter box. I don't know that it is. Would I
 9 believe it if somebody told me it is? I'd believe
 10 it. But you're asking me to make a definite
 11 statement based on no foundation.
 12 Q. BY MR. WILLIAMS: Well, in fairness to
 13 you, Glenn Anderson if he hasn't will testify that
 14 that was a planter box used, I think, from the
 15 Portland store which they put that in. Somebody
 16 took it out, a prototype from another store. So
 17 had they done that here, he's not even close to
 18 putting it in that planter box, right?
 19 MS. CANNON: Objection. Calls for
 20 speculation.
 21 THE WITNESS: I did not see it actually in.
 22 I've seen the photographs. That's not sufficient
 23 for me to make a statement
 24 Q. BY MR. WILLIAMS: But did Mr. Pope,
 25 himself, have any duty to confirm the proper

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1 landscaping for \$23,000. I think that's Exhibit
 2 *-001 or *-002.
 3 A. Yeah.
 4 Q. And we've looked at several change
 5 orders.
 6 A. We looked at one.
 7 Q. There were actually three which have
 8 nothing to do with this green box. Their work --
 9 part of the installation of the sprinkler system
 10 and landscaping. It's the same scope of work, same
 11 contract, just change orders between Canyon Park
 12 and Idaho Scapes. August 4th, September 8th, and
 13 then attached to that is on Idaho Scapes
 14 letterhead, this is his invoice, and he's got
 15 Canyon Park Estates there on this one. This is
 16 change order No. 2.
 17 Same thing with -- no. Let's look
 18 at -- I was curious. I just noticed this. Change
 19 order No. 3, same letterhead, Pope's letterhead.
 20 This is his invoice, Canyon Park East, Sportsman's
 21 Warehouse. For some reason, it may just be -- I
 22 don't know why Mr. Pope -- this is his invoices
 23 that he prepared on his letterhead. Do you see
 24 that?
 25 A. May I look at it?

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1 Q. Sure. Take a look at the type style
2 or font there on his letterhead, his invoices.
3 A. Well, both of these are for the same
4 contract, No. 03-3. They're both labeled on the
5 actual change order, signature side, Canyon Park,
6 LLC. I would say it's just --
7 MS. CANNON: You haven't been asked.
8 THE WITNESS: I wouldn't say.
9 Q. BY MR. WILLIAMS: Well, now, they're
10 clearly change orders pursuant to his contract with
11 Canyon Park, are they not, and invoices he's
12 sending?
13 A. This --
14 MS. CANNON: If you know.
15 THE WITNESS: This page is clearly. This
16 page seems to be.
17 Q. BY MR. WILLIAMS: He brought it to his
18 depo stapled yesterday.
19 A. You'd have to ask him then.
20 Q. We did. This is the third one he
21 brought.
22 A. Then why is he asking me?
23 Q. This is peculiar, another change order
24 or an invoice.
25 MS. CANNON: I will object to that

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1 Q. BY MR. WILLIAMS: But is the type the
2 same here as this Sportsman's Warehouse? Can you
3 see that?
4 A. It appears to be the same. But,
5 again, my computer can do that and so can yours.
6 MR. HEPWORTH: Object on lack of
7 foundation. He's a contractor, not a forensic
8 writing examiner.
9 MR. BROWN: He was asked previously to
10 identify the meaning of the type face, and so I
11 think it's proper follow-up.
12 MR. HEPWORTH: I can still object. I think
13 it's a lack of foundation. It's a different kind
14 of expertise is my objection.
15 MR. BROWN: It's his, not mine.
16 Q. BY MR. WILLIAMS: All Mr. Pope's work
17 for Canyon Park on this project and the 23-, 24,000
18 dollars with change orders, that was all done
19 pursuant to this contract and billed to Canyon
20 Park, right?
21 MS. CANNON: If you know.
22 THE WITNESS: How would I know?
23 Q. BY MR. WILLIAMS: Do you know of any
24 plausible reason why he would suddenly change after
25 all that and do some extra valve work and tie it in

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1 characterization. There were three actual change
2 orders that he identified as change orders. That
3 is not one of them.
4 Q. BY MR. WILLIAMS: This is a third
5 document he brought that shows sprinkler parts,
6 labor to install. It doesn't have his letterhead
7 on it at the top. I don't know. I'm not
8 suggesting anyone's cut and pasted or removed. I'm
9 not sure how it happened. We weren't given an
10 original. But is it not evident to you that the
11 type, font style is the same?
12 A. Yes. But it means nothing.
13 MS. CANNON: Objection.
14 Q. BY MR. WILLIAMS: Well, the mere fact
15 that this is --
16 A. I have a computer that can do that.
17 Q. -- Sportsman's Warehouse here does not
18 suggest to you that he's somehow contracted with
19 Sportsman's Warehouse, does it? This one says
20 Sportsman's Warehouse here. Take that off, it's
21 identical?
22 MS. CANNON: Objection. Calls for
23 speculation. Calls for facts not in evidence.
24 THE WITNESS: This doesn't suggest anything
25 to me.

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1 to a sprinkler system and then suddenly contract
2 with Sportsman's Warehouse or Eckman Mitchell after
3 he's done all of this other work for Canyon Park?
4 MS. CANNON: Objection, calls for
5 speculation. You can answer if you know.
6 MR. HEPWORTH: I join.
7 THE WITNESS: I would know of no plausible
8 reason why I would have any information about this
9 shared with me by any contractor or participant
10 therein, therefore, would know nothing about it.
11 Q. BY MR. WILLIAMS: It wouldn't it
12 strike you as bizarre if he had done all of this
13 work in his contract with the developer, suddenly
14 he would do some additional work and change his
15 contractor who he's contracted with?
16 A. No. That does not strike me as
17 bizarre.
18 Q. We haven't got this far in
19 discovery -- another reason that highlights we have
20 made available for inspection, though Nikki, Jeff,
21 and Jeremy haven't come down, all of the
22 subcontracts that are in my office. They're
23 probably going to need to come see them. There is
24 no contract, I'll represent, between Eckman
25 Mitchell and Mr. Pope.

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1 A. Okay.

2 Q. Are you aware of that? And if the
3 testimony shows that Eckman Mitchell did not hire
4 him, or the evidence documents, or pay him, do you
5 have any reason to dispute that?

6 MR. HEPWORTH: Are you asking him to assume
7 there is no contract, because that's what I heard
8 you say.

9 Q. BY MR. WILLIAMS: I'm saying are you
10 aware of anything to dispute that, or do you have
11 any reason to dispute it?

12 A. Are you asking me --

13 Q. It's a bad question.

14 A. Well, it lost me. I'm really sorry.

15 Q. That's fine. I'll withdraw that
16 question.

17 I did want to follow up on a series of
18 questions about is it possible that Scott Duke
19 installed this at a tilt. And I think you said
20 it's possible, but you doubted, in your expert
21 opinion?

22 A. It's possible but not practical, and I
23 doubt that it was done.

24 Q. And as far as trials are concerned or
25 summary judgment motions, you need to present

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1 it with the developer, as he says, and the
2 developer said leave it, leave it there, we may use
3 it in the future.

4 MR. HEPWORTH: I have to go. Sorry.
(Mr. Hepworth left the deposition.)

6 Q. BY MR. WILLIAMS: Is it still lax and
7 lazy if he's gone to the developer and the
8 developer says leave it there, do you still have
9 that opinion?

10 A. No. Because that's what I would
11 expect of him, to communicate.

12 Q. So we just have to decide whether he's
13 telling the truth or not about that?

14 MS. CANNON: About what?

15 Q. BY MR. WILLIAMS: Whether he did go to
16 the developer and say, hey, what's this doing here,
17 and the developer said leave it.

18 MS. CANNON: I question that that's
19 actually in the record.

20 MR. WILLIAMS: Well, we'll have to depose
21 Glenn again and get an affidavit.

22 Q. BY MR. WILLIAMS: But if that's what
23 he's going to testify to, then you don't believe
24 that would be lax or lazy?

25 A. That would be a step in the right

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1 evidence that's not based on speculation. Anything
2 is possible, but you've seen no evidence to suggest
3 it was not installed properly at the time?

4 A. Correct.

5 Q. And, in fact, of all the people with
6 personal knowledge -- Scott Duke, Ray Patience --
7 they've all testified it was flush at the time, and
8 you've read their depositions stating that, true?

9 A. Yes.

10 Q. And there was a walk-through with the
11 architect, with the city inspector, with the
12 developer, and it was not noted, correct?

13 MS. CANNON: I think this has all been
14 asked and answered. Is it really necessary to go
15 over it again.

16 MR. HEPWORTH: Yeah. This isn't trial.
17 Let's find out the opinions and be done.

18 Q. BY MR. WILLIAMS: Mr. Anderson, you
19 read a few paragraphs from his deposition and you
20 offered the opinion that when Glenn Anderson said,
21 oh, this screen box is here, it's not within our
22 scope, that him saying that was lax and lazy. Do
23 you recall that?

24 A. That's my opinion of his response.

25 Q. But if it's true that if he discussed

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1 direction.

2 Q. We've talked a lot about -- I think
3 you said a subcontractor if he does something
4 negligently, the general he contracts with is
5 liable or responsible for that?

6 A. Ultimately, yes.

7 Q. Eckman Mitchell in its contract -- we
8 didn't go through this in detail, but you're
9 familiar with the definition of work. They define
10 the scope of their work in their contract with
11 Sportsman's, correct?

12 A. Yes.

13 Q. And here they define the term work
14 means the construction and services required by the
15 contract documents, whether completed or partially
16 completed, and includes all other labor, materials,
17 equipment, and services provided or to be provided
18 by the contractor to fulfill the contractor's
19 obligation.

20 So they're defining what their work
21 is, all their labor, all of their material. Okay?
22 And they're standing by that in this contract.
23 They warrant that. You're familiar with -- if we
24 give you defective materials, labor, true, you're
25 familiar with those provisions?

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1 A. Yes.
2 Q. Then they're responsible. But if it's
3 outside of their scope of work and everybody else
4 provides materials that are defective or something,
5 then they're not responsible for it under this
6 contract. True?
7 A. Correct.
8 Q. So if, in fact, Mr. Pope was providing
9 materials that turn out to be defective or
10 inadequate for this site under the contract with
11 Canyon Park, that's beyond the scope of Eckman
12 Mitchell's contractual obligations?
13 A. The materials are, correct. The
14 process of getting them in place is not exempted.
15 Q. Choosing where they're located, is
16 that what you're saying?
17 A. And how they're installed, yes, that's
18 correct.
19 Q. But just so I'm clear, when I say
20 material, the question -- the statement that that
21 box, green box, is not suitable for application in
22 concrete, Eckman Mitchell does not warrant or
23 that's not part of their scope of work, is it?
24 MS. CANNON: Under the parameters that
25 you've previously laid.

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1 Q. BY MR. WILLIAMS: True?
2 A. Eckman Mitchell did not have the
3 authority to specify and/or accept or reject that
4 box.
5 MS. CANNON: Assuming that the contract was
6 with Canyon Park.
7 THE WITNESS: Correct.
8 Q. BY MR. WILLIAMS: You said -- Scott
9 Duke, you've described him and you've extolled his
10 work, purely professional, you've read his
11 deposition. He's a person who obviously has been
12 doing this his whole life and takes tremendous
13 pride in doing it. But I think you testified in
14 response to my questions that despite his excellent
15 workmanship he should have known that this green
16 box was not suitable for a concrete application; is
17 that correct?
18 A. That's correct.
19 Q. And I'm just trying to -- if he spent
20 his whole life pouring concrete and he's never
21 installed a sprinkler or a valve box in his entire
22 life, why do you expect him to know how many pounds
23 per square inch, what those specs are, or whether
24 it can hold up to freezing, anything about it? Why
25 would you expect him to know that?

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1 A. Where did you come up with the
2 definitions of what I would expect him to know?
3 Q. I thought when I deposed you earlier
4 this morning you said Scott should have known that
5 green box was not suitable for use in concrete?
6 A. Yes.
7 Q. He knows about concrete. But if
8 somebody else puts in a box like a city meter or
9 whatever it is beyond his scope of work, why do you
10 say he should have known whether the material is
11 defective or adequate, or why do you say that?
12 A. I didn't say that. I just said that
13 Scott should have known that to place a bottomless
14 box in a dirt situation surrounded by concrete is
15 an improper installation. He should have at least
16 questioned it. I did not expect him to know all of
17 the technical aspects or implications of it. I did
18 not expect him to know the strength of the box.
19 Just to know that -- he knows and understands dirt
20 and gravel, he works with that every day. He knows
21 bearing capacities and how in general they will
22 respond. I think he should have known.
23 Q. And, I'm sorry. I'm sure it's I'm
24 dense or tired, but I'm having trouble
25 understanding what it is that he should have known,

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1 that you can't put a plastic box in concrete?
2 A. That a bottomless box sitting on dirt
3 has a good probability of settling.
4 Q. Okay. So I misunderstood you earlier.
5 I thought you were saying that he should have been
6 aware that Carson Industries does not recommend
7 that a plastic box be used in concrete?
8 A. No. Not a problem.
9 Q. He should have been aware that a
10 bottomless box could settle?
11 A. Yes.
12 Q. Do you know if he was able to
13 visualize the bottom or whether or not dirt or
14 gravel had been built up around it?
15 A. Probably dirt -- probably dirt and
16 gravel had been built up around it. But anyone
17 who's been in the industry knows what the inside of
18 that box looks like.
19 Q. Which industry, the concrete or the
20 landscaping irrigation?
21 A. Construction, concrete, landscaping
22 irrigation, electrician.
23 Q. Why would a guy who's poured concrete
24 his whole life -- should be aware of a plastic
25 irrigation box, how it's constructed, whether it

1 has a bottom or not?
 2 A. Because he has worked on sites where
 3 those have been installed a number of times.
 4 Q. In concrete?
 5 A. Yes.
 6 Q. Well, so if it's happening over and
 7 over again, then is it okay to do it?
 8 A. Let's don't run a circle on that
 9 question. That's not what I'm saying.
 10 Q. What are you saying?
 11 A. I'm saying that he has seen those
 12 boxes that are installed. And we're responding to
 13 how would he know that it's bottomless. He's seen
 14 them stacked on the job site.
 15 Q. Oh, stacked on the --
 16 A. He's seen them installed. He has seen
 17 people hooking up connections down inside of them.
 18 Q. In concrete, do you think --
 19 A. I don't know on that.
 20 Q. You're just speculating on that
 21 really?
 22 A. I don't know on that.
 23 Q. If it had been put on a proper
 24 concrete pad as you describe it, it would have been
 25 acceptable in your opinion, and this wouldn't have

1 have a right to rely that the electrical people
 2 have put in proper gauge wiring and so on and so
 3 forth ad infinitum, true?
 4 A. They have a right to --
 5 Q. Rely that electrical, plumbing, they
 6 have used proper materials and they don't have to
 7 second-guess, verify?
 8 A. Yes.
 9 MR. WILLIAMS: I'm done.
 10
 11 FURTHER EXAMINATION
 12 BY MR. BROWN:
 13 Q. As I understand it correctly, when
 14 we've discussed the contract limit line, that's a
 15 line that you have found on some versions of the
 16 plan. Do you know in looking at the plan how far
 17 away that contract limit line is from the exterior
 18 of the front of the Sportsman's Warehouse building?
 19 A. It appears to be 25 feet, 4 inches.
 20 Q. Now, we've also discussed today that
 21 the developer -- you indicated something?
 22 A. You pointed at the building. And I
 23 looked at it -- that's the back of the building.
 24 The contract limit line is not identified or
 25 dimensioned on the front. The 25 feet 4 inches is

1 settled over time?
 2 A. No. I suggested that putting it on a
 3 concrete pad would have been one way to lessen the
 4 risk of it settling.
 5 Q. And would it have been suitable had
 6 that been done, suitable application?
 7 A. I'm not comfortable being in the role
 8 of a designer. But I will tell you this, if I were
 9 the designer, I would not have put that concrete --
 10 that plastic box in there on any kind of
 11 installation.
 12 Q. Well, if you're uncomfortable being a
 13 designer, Scott Duke is certainly not a designer,
 14 nor is Eckman Mitchell, correct?
 15 A. Correct.
 16 Q. Don't they have a right to rely that
 17 design professionals beyond their scope of work are
 18 doing their jobs in a non-negligent manner?
 19 A. Yes, with the understanding that they
 20 also have a right and a responsibility to ask a
 21 question if something looks amiss.
 22 Q. That assumes to Scott Duke it looks
 23 amiss?
 24 A. Yes.
 25 Q. And Scott Duke and Eckman Mitchell

1 on the south and the back of the building.
 2 Q. Okay. Is it safe to say that it's
 3 been described as extending to the curb; is that
 4 roughly correct?
 5 A. Yes.
 6 Q. Is the curb more than five feet away
 7 from the front of the building?
 8 A. Yes.
 9 Q. In fact, it's 20 or something feet
 10 away?
 11 A. Yes.
 12 Q. There's also been discussion about the
 13 contract, the developer bringing the waterline to
 14 within five feet of the building; is that correct?
 15 A. Yes.
 16 Q. Now, on the planned drawings where the
 17 waterline is coming in, there's no deviation of the
 18 contract line. I mean, it doesn't swing around to
 19 show that intrusion within five feet, does it?
 20 A. I think you've jumped a step here,
 21 Jeremy. You said that we have had a discussion
 22 about the developer bringing the water line to
 23 within five feet of the building.
 24 Q. Okay.
 25 A. We did have a discussion about that.

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1 But we found no place that it said this is where he
2 will bring it. We got the five feet from our
3 discussion of the plumbing subcontractor's contract
4 saying that he would bring the waterline out five
5 feet.

6 Q. I'll get to that. I just wanted to
7 kind of set it up first. I appreciate you pointing
8 out that step.

9 So let's assume now that the
10 contractors bring it in within five feet of the
11 building?

12 A. Okay.

13 Q. Now, this contract limit line is drawn
14 on the plans. It doesn't deviate or swing in to
15 illustrate that that's the case, that it's reduced
16 to five feet at that point, correct?

17 A. That's correct.

18 Q. So that is the case. Wherever we have
19 this language that the contractor is to bring the
20 pipe within five feet, that would be a written
21 exception to the contract limit line?

22 A. No.

23 Q. Didn't you say that there's certain
24 exceptions to the contract limit line that you
25 would expect to find in writing?

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1 typical contract law.

2 Q. I want to look at the lease again. Do
3 you still have that in front of you?

4 A. Maybe. Yes.

5 Q. Can you look at Exhibit E on page 28.

6 A. Okay.

7 Q. Isn't it correct that when we
8 discussed Exhibit E previously these are things
9 that are to be done by Canyon Park as part of their
10 responsibilities under the lease; isn't that
11 correct?

12 A. I'd have to go back through it again,
13 but that's my memory.

14 Q. You can turn back to, I think it's
15 paragraph 6.0 or 6.1.

16 A. These are the initial site
17 improvements described on E-1, and the landlord
18 will complete them. I'm with you.

19 Q. Now, if we look at paragraph No. 2 on
20 Exhibit E-1, it says -- tell me if I read this
21 incorrectly -- utilities, gas, water, electric,
22 sanitary sewer, telephone shall be installed to
23 within five feet of the building pad of the
24 premises as depicted on Exhibit B, together with
25 separate meters to all utilities.

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1 A. I said there are certain exceptions
2 within the contract line. Something that's
3 contained in here that is not the responsibility of
4 the designer and the general contractor.

5 Q. So the exception doesn't move the
6 contract limit line. It just shows that within
7 this contract limit line someone else has come in
8 to perform work, and pursuant to this exception
9 they're responsible for it?

10 A. Yeah. That's fair. I think that's
11 fair. Yes.

12 Q. So what we need to do then is find the
13 language that says that the contractor was bringing
14 the pipe within five feet of the building, and
15 we'll see the exception that shows they're
16 responsible for it?

17 A. You are talking then about the
18 two-and-a-half-inch water service line?

19 Q. Yes. Service to the building. I
20 thought -- and I'll get to that, but yes.

21 A. Okay. Yes, if there were -- if the
22 language -- well, if you bring work inside the line
23 and you do so by permission, so to speak, in other
24 words, you have a responsibility to do this, then
25 you assume the responsibility of your work. That's

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1 Did I read that correctly?

2 A. Yes, you did.

3 Q. So here in Exhibit E-1 we have found
4 an exception to the contract limit line with the
5 landowner being -- responsibility for coming within
6 five feet of the building with these utilities. Is
7 that fair to say?

8 A. No.

9 Q. Why not?

10 A. We have -- herein we have discovered
11 permission to cross the contract limit line to
12 perform specified work.

13 Q. I keep making this mistake. But to
14 cross the limit line and to perform specified work
15 it then becomes the landowner's, or whoever they
16 have perform this work, responsibility to perform
17 that work in a proper manner; isn't that correct?

18 A. Yes.

19 Q. They assume responsibility for
20 bringing the line within five feet?

21 A. Contractually, they did, that's
22 correct.

23 Q. And so just to kind of wrap it up,
24 exceptions -- and I'm going to make this mistake
25 again.

1 A. It's all right. I'll be here.
 2 Q. Exceptions regarding responsibilities
 3 for areas within the contract limit line are
 4 contained within the lease?
 5 A. I'm not going to say that. But I
 6 would say that there is an allowance given for the
 7 response -- to perform the responsible work within
 8 the contract limit line.
 9 Q. Okay.
 10 A. Permission, allowance, whatever word
 11 you use -- use whatever word you want. But don't
 12 use the word exception, because it means a whole
 13 lot of different things.
 14 Q. Okay. So, in fact, the contract limit
 15 line is a line on the plans that in the trade is
 16 given some importance?
 17 A. Yes.
 18 Q. But we haven't looked at any language
 19 in any contractual language saying who has
 20 responsibility on either side of it. This is just
 21 something you're assuming based on your experience
 22 in the trade. The importance of the contract limit
 23 line, we haven't looked at any language in any
 24 contract saying where this contract limit line
 25 falls on the plans you have responsibility for

1 Q. This is also specific contractual
 2 language addressing responsibility for doing work
 3 regardless of where this contract limit line lies;
 4 isn't that correct?
 5 MS. CANNON: Objection. Calls for
 6 speculation.
 7 THE WITNESS: Agree. That's not a question
 8 that can be answered without a great deal of study.
 9 I just -- I can't answer that. I'm sorry.
 10 Q. BY MR. BROWN: Is there any reason why
 11 if we have specific duties in the contract that are
 12 called for the developer to perform and one of them
 13 is landscaping -- okay. So you're on board with me
 14 to that point, correct?
 15 A. I am.
 16 Q. And that's similar and found in almost
 17 the same provision as bringing water and sewage
 18 service utilities to within five feet of the
 19 building; isn't that correct?
 20 A. It is covered in the same paragraph,
 21 yeah, 6.1, as an owner-developer responsibility,
 22 yes.
 23 Q. So isn't it reasonable then to say
 24 that just as the owner has responsibility for their
 25 work installing the utilities within five feet of

1 inside, and I have responsibility for outside. We
 2 haven't found that language, have we?
 3 A. I don't remember it, no.
 4 Q. So for the importance of the contract
 5 limit line, that's just maybe something standard in
 6 the trade. But here in the lease we have specific
 7 contractual language regarding responsibility,
 8 correct?
 9 A. Yes, we do.
 10 Q. Now, this Exhibit E-1, I'm correct
 11 that that falls within pad condition, it's an
 12 exhibit to paragraph 6.1; is that correct?
 13 A. Yes.
 14 Q. So you have two areas there. You have
 15 the initial site improvements and you have
 16 concurrent site improvements?
 17 A. Yes.
 18 Q. And we've talked about this a little
 19 bit before, but if we go to Exhibit E-2, which is
 20 also the landowner's responsibility -- is that
 21 correct?
 22 A. Yes.
 23 Q. And where it says all landscaping for
 24 the premises shall be installed?
 25 A. Yes.

1 the building, they also have responsibility for
 2 their work installing landscaping within the area
 3 of the building?
 4 MS. CANNON: Objection. The exhibit speaks
 5 for itself. Exhibit E-2, that's the document. And
 6 it does not have any indication of dimensions,
 7 location such as E-1 does, so I'll object. That
 8 mischaracterizes the document.
 9 Q. BY MR. BROWN: You can go ahead and
 10 answer.
 11 A. And I concur with that. That is
 12 exactly my answer. E-1 specifies a point within
 13 the contract term limits. E-2 just says the
 14 premises. It's undefined.
 15 Q. Right. Okay. So E-1 says within five
 16 feet?
 17 A. Yes.
 18 Q. But E-2, as far as landscaping, it
 19 says all. All landscaping.
 20 A. For the premises and the shopping
 21 center. Yes. That's what it says.
 22 Q. So there's no landscaping that is
 23 excluded -- I guess we can all know what all
 24 landscaping means. But that has no -- just as you
 25 said, it's not specific to any location, that also

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1 works against the property owner here. When they
2 contract to be responsible for all landscaping,
3 then that means all landscaping within the premises
4 and the shopping center as defined in that
5 sentence, does it not?

6 MS. CANNON: Objection. Calls for legal
7 conclusion and speculation.

8 THE WITNESS: If I understood what premises
9 are it might be easier to answer, but it's pretty
10 ambiguous.

11 Q. BY MR. BROWN: Turn to the front page
12 of the contract, please. Do you see under recitals
13 the second full paragraph?

14 A. Yes.

15 Q. And it has a section that has premises
16 in quotation marks?

17 A. Uh-huh.

18 Q. And which portion is depicted on
19 Exhibit B attached and then the premises?

20 A. Uh-huh.

21 Q. If we turn to Exhibit B, would you
22 expect that Exhibit B would show us what the
23 premises are?

24 A. I would expect it to.

25 Q. Site plan and premises. You know

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1 Q. BY MR. BROWN: Are you aware of any
2 area that would not fall under either premises or
3 the development that this Exhibit E-2, paragraph 2,
4 could refer to?

5 A. My knowledge of all of the details of
6 this project are so limited, I think I would be way
7 out on a limb trying to interpret that.

8 Q. Okay. So you're willing to interpret
9 what the meaning of this line is, the contract
10 limit line, and that's from your experience?

11 A. Yes.

12 Q. But as far as individual
13 responsibilities that may be contractually
14 contained within the lease or other places, are you
15 saying that falls outside of your expertise?

16 A. Yes.

17 Q. I'm going to go into this quagmire
18 that everyone else has stepped into.

19 MS. CANNON: It's like 20 till. And he
20 needs to be out of here before 3:00. He's got to
21 be somewhere at 3:00.

22 MR. BROWN: The document produced by Blaine
23 Pope yesterday, is that marked as an exhibit?

24 MS. CANNON: It is.

25 MR. BROWN: Can you tell me the number,

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1 what, we have a version of this contract that's
2 missing Exhibit B-1 -- no. Sorry. My fault. So
3 premises there is defined as 45,475 square feet
4 depicted on Exhibit B-1; is that correct?

5 A. No. 6 is premises and is shown as that
6 45,475 square footage.

7 Q. If I told you that was the square
8 footage of the interior of the building, then if
9 you're saying that the landlord is responsible for
10 all landscaping in the center and the premises,
11 that pretty much includes the entire development?

12 A. I think you're asking me to interpret
13 a document that really has no relevance to me.

14 Q. Well, you asked me what premises
15 meant, so you couldn't know whether all landscaping
16 -- and you said -- it listed the development and
17 premises?

18 A. Yes.

19 Q. And it appeared to me that you were
20 avoiding the question because you didn't know what
21 premises meant. So I was just trying to clear up
22 for you what premises meant?

23 A. I was just avoiding the question.

24 MS. CANNON: I'll renew my earlier
25 objections.

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1 please.

2 MR. WILLIAMS: It was yesterday.

3 MR. BROWN: That's okay. I'll just refer
4 to it.

5 Q. BY MR. BROWN: You were asked by
6 Ms. Canyon what this document seemed to be to you?

7 MS. CANNON: Exhibit *-001 to Blaine
8 Pope --

9 Q. BY MR. BROWN: Exhibit *-001 to Blaine
10 Pope's deposition. And I believe you said a bid to
11 Sportsman's?

12 A. I said it is a bid to do some work,
13 and it has Sportsman's Warehouse name at the top.

14 Q. So the bid to do work, I mean, you
15 have no idea how this document was created?

16 A. No.

17 Q. Or who created it or why?

18 A. No.

19 Q. The Sportsman's Warehouse, you have no
20 idea if that refers to the location where the work
21 would be performed or who was to receive the
22 document, do you?

23 A. That's correct.

24 Q. And I believe what Brad was trying to
25 get at is that in other documents it appears that

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1 at the top of a bid Mr. Pope places the name of the
2 area where the work is to be performed and that
3 this may be consistent with that. Do you have any
4 knowledge regarding that?

5 A. I do not.

6 Q. Now, there was also some questions
7 regarding would it be unusual for Mr. Pope to take
8 directions from an entity other than Canyon Park or
9 its construction supervisor, you remember that,
10 correct?

11 MS. CANNON: Other than with whom he
12 contracted.

13 MR. BROWN: I'll get to it.

14 Q. BY MR. BROWN: Now, I believe that the
15 testimony from Mr. Pope yesterday is that when he
16 installed the irrigation box, he was called by
17 Mr. Shotwell. Do you know who Mr. Shotwell is?

18 MS. CANNON: I will object to the
19 characterization.

20 Q. BY MR. BROWN: Or that his
21 communications were with Mr. Shotwell?

22 A. The question is do I know who
23 Mr. Shotwell is. Yes, I know him personally. And
24 I saw his name earlier on a document that was
25 produced, labeled as the construction manager.

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1 on the irrigation box in question, isn't it more
2 likely true that it was Mr. Shotwell and Canyon
3 Park that was directing his activities?

4 MS. CANNON: Objection. Calls for
5 speculation.

6 THE WITNESS: Again, more than likely, I
7 can't assign -- restate the question. I'd be very
8 happy to give you an answer to it if you give me a
9 clear question.

10 Q. BY MR. BROWN: If Mr. Pope was
11 communicating with Mr. Shotwell, who would you
12 think is then directing Mr. Pope's work on the
13 site?

14 MS. CANNON: Calls for speculation. Answer
15 if you know.

16 THE WITNESS: I don't know.

17 Q. BY MR. BROWN: Would it be unusual for
18 Mr. Shotwell to communicate directly with
19 subcontractors of either Eckman Construction or
20 Sportsman's Warehouse?

21 A. It would be very unusual.

22 Q. I think that's what I was getting at.
23 Thank you.

24 A. Okay. Sorry about that.

25 Q. There's been some talk about the

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1 Q. And that's the construction manager
2 for Canyon Park?

3 A. That's correct.

4 Q. Now, I want to go back to that line of
5 questioning. If -- and I'm not saying this is the
6 case. But hypothetically if Blaine Pope had
7 entered a contract with either Eckman or
8 Sportsman's to install the planter box, would it be
9 unusual for him to communicate or receive direction
10 on doing that through Mr. Shotwell, the
11 construction representative of Canyon Park?

12 A. It would be very unusual for him to
13 receive direction having to do with anything other
14 than a schedule from Mr. Shotwell if his contract
15 was with someone else.

16 Q. So whoever he received that
17 communication to install the box is more than
18 likely the entity that was directing his work at
19 that time or the entity he is contracted with?

20 A. I can't even say that's more than
21 likely because I don't know who he spoke to. I
22 don't know who he regarded as the boss, the
23 authority on the job.

24 Q. Let me give you the hypothetical then.
25 If he was contacted by Mr. Shotwell to perform work

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1 relationship between the architect in this case and
2 Sportsman's Warehouse. And maybe not a direct line
3 of questioning but some reference to that
4 relationship. If we needed to know the duties of
5 the architect related to Sportsman's Warehouse,
6 that would come from reading the contract between
7 the two of them rather than anything you have to
8 provide; isn't that correct?

9 A. Yes.

10 Q. So any statements you might have made
11 regarding the relationship with the architect to
12 Sportsman's Warehouse is kind of talking out of
13 turn. You really have to look at that contract to
14 determine the relationship?

15 A. I have talked about industry standards
16 and what I would expect, and that is exactly what
17 I've expressed to you. I don't have knowledge of
18 any communication that they have taken directly and
19 only have their contract, but I rely on what I read
20 in that contract.

21 Q. Any industry standards can be changed
22 per contract, correct?

23 A. Yes.

24 Q. So it's really the contract you have
25 to look at?

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1 A. Yes.
2 Q. Do you have any knowledge of the
3 walk-through process that Canyon Park engaged in at
4 the time that construction was completed on this
5 building?
6 A. No. I've only read in depositions
7 that it did -- there was a final walk-through.
8 Q. Have you been involved in cases such
9 as this -- not cases but construction projects such
10 as this where a tenant constructs a building and
11 then the building is leased after that and turned
12 back over to the owner?
13 A. No.
14 Q. So this is your first time being
15 involved in that type of situation?
16 A. Where the tenant was so intimately
17 involved in the construction, yes, this is my first
18 time to see that.
19 Q. In other instances when the tenant is
20 involved in the construction, what does the owner
21 of the building usually do upon completion of
22 construction to ensure, you know, the course of
23 construction and the condition of the building?
24 A. At completion of construction he has a
25 walk-through inspection.

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VERIFICATION

STATE OF)
COUNTY OF) ss.

I, Glenn S. Arrington, say that I am the witness referred to in the foregoing deposition taken October 16, 2009, consisting of pages numbered 1 to 284; that I have read the said deposition and know the contents thereof; that the same are true to my knowledge, or with corrections, if any, as noted.

Page Line Should Read Reason

Glenn S. Arrington

Subscribed and sworn to before me this day of 2009, at , Idaho.

(Seal) Notary Public for Idaho
My Commission Expires

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1 MS. CANNON: I don't know if that's
2 relevant since he's acknowledged that this was an
3 unusual situation and not like the one you just
4 asked him about.
5 MR. BROWN: I asked him in his experience.
6 THE WITNESS: What would -- would I have
7 expected them to walk through?
8 Q. BY MR. BROWN: Yes.
9 A. Yes.
10 Q. Are you aware that the developer had
11 final approval for all plans regarding the exterior
12 of the building?
13 A. We've read a phrase today that said
14 the building had to configure with the others in
15 the facility. That's all I know.
16 MR. BROWN: I think I'm done.
17 MS. CANNON: I'm not going to ask another
18 question. I had planned to but, God forbid, it
19 would open up another line of questioning.
20 (The deposition concluded at
21 2:47 p.m.)
22 -00000-
23
24
25

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REPORTER'S CERTIFICATE

STATE OF IDAHO)
COUNTY OF BONNEVILLE) ss.

I, Sandra D. Terrill, CSR, RPR, and Notary Public in and for the State of Idaho, do hereby certify:

That prior to being examined Glenn S. Arrington, the witness named in the foregoing deposition, was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true, and verbatim record of said deposition.

I further certify that I have no interest in the event of the action.
WITNESS my hand and seal this 28th day of October 2009.

Sandra D. Terrill
Idaho CSR No. 702,
Notary Public in and for
the State of Idaho.

My Commission Expires: 11-10-10

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VERIFICATION

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REPORTER'S CERTIFICATE

STATE OF IDAHO)
COUNTY OF BONNEVILLE) ss.
)

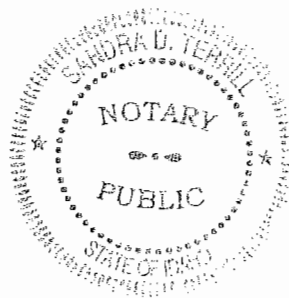
I, Sandra D. Terrill, CSR, RPR, and Notary Public in and for the State of Idaho, do hereby certify:

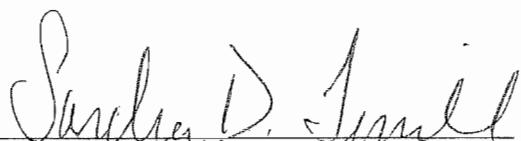
That prior to being examined Glenn S. Arrington, the witness named in the foregoing deposition, was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true, and verbatim record of said deposition.

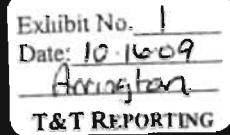
I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 28th day of October 2009.




Sandra D. Terrill
Idaho CSR No. 702,
Notary Public in and for
the State of Idaho.

My Commission Expires: 11-10-10



AIA DOCUMENT A101-1997

Standard Form of Agreement Between Owner and Contractor where the basis of payment is a STIPULATED SUM

AGREEMENT made as of the
in the year
(In words, indicate day, month and year)

29th

day of May, 2003

BETWEEN the Owner:
(Name, address and other information)

Sports Warehouse Inc.
7035 South 185 West
Midvale, UT. 84047

and the Contractor:
(Name, address and other information)

Eckman & Mitchell Construction
3032 South 1030 West
Salt Lake City, UT 84119

The Project is:
(Name and location)

Sportsmans Warehouse Twin Falls, ID.
1940 Bridgeview Blvd.
Twin Falls, ID. 83301

The Architect is:
(Name, address and other information)

GA Architects
3032 South 1030 West Suite 201
Salt Lake City, UT. 84119

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

AIA Document A201-1997, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

This document has been approved and endorsed by The Associated General Contractors of America.



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OWNER-CONTRACTOR
AGREEMENT

The Owner and Contractor agree as follows.

The American Institute
of Architects
1735 New York Avenue, N.W.
Washington, D.C. 20006-5292

ARTICLE 1 THE CONTRACT DOCUMENTS

The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement; these form the Contract, and are as fully a part of the Contract as if attached to this Agreement or repeated herein. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Contract Documents, other than Modifications, appears in Article 8.

ARTICLE 2 THE WORK OF THIS CONTRACT

The Contractor shall fully execute the Work described in the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others.

ARTICLE 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

3.1 The date of commencement of the Work shall be the date of this Agreement unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner.

(Insert the date of commencement if it differs from the date of this Agreement or, if applicable, state that the date will be fixed in a notice to proceed.)

If, prior to the commencement of the Work, the Owner requires time to file mortgages, mechanic's liens and other security interests, the Owner's time requirement shall be as follows:

3.2 The Contract Time shall be measured from the date of commencement.

3.3 The Contractor shall achieve Substantial Completion of the entire Work not later than _____ days from the date of commencement, or as follows:

(Insert number of calendar days. Alternatively, a calendar date may be used when coordinated with the date of commencement. Unless stated elsewhere in the Contract Documents, insert any requirements for earlier Substantial Completion of certain portions of the Work.)

, subject to adjustments of this Contract Time as provided in the Contract Documents.

(Insert provisions, if any, for liquidated damages relating to failure to complete on time or for bonus payments for early completion of the Work.)



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ARTICLE 4 CONTRACT SUM

4.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of the Contract. The Contract Sum shall be Two million three hundred ninety nine thousand two hundred forty six Dollars(\$ 2,399,246), subject to additions and deductions as provided in the Contract Documents.

4.2 The Contract Sum is based upon the following alternates, if any, which are described in the Contract Documents and are hereby accepted by the Owner:

(State the numbers or other identification of accepted alternates. If decisions on other alternates are to be made by the Owner subsequent to the execution of this Agreement, attach a schedule of such other alternates showing the amount for each and the date when that amount expires.)

4.3 Unit prices, if any, are as follows:

ARTICLE 5 PAYMENTS

5.1 PROGRESS PAYMENTS

5.1.1 Based upon Applications for Payment submitted to the Architect by the Contractor and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents.

5.1.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows:

5.1.3 Provided that an Application for Payment is received by the Architect not later than the Tenth (10) day of a month, the Owner shall make payment to the Contractor not later than the Tenth (10) day of the Following month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than Thirty (30) days after the Architect receives the Application for Payment.

5.1.4 Each Application for Payment shall be based on the most recent schedule of values submitted by the Contractor in accordance with the Contract Documents. The schedule of values shall allocate the entire Contract Sum among the various portions of the Work. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.



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5.1.5 Applications for Payment shall indicate the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment.

5.1.6 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

- 1 Take that portion of the Contract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Contract Sum allocated to that portion of the Work in the schedule of values, less retainage of Five (5) percent (5 %). Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute shall be included as provided in Subparagraph 7.3.8 of AIA Document A201-1997;
- 2 Add that portion of the Contract Sum properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the completed construction (or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing), less retainage of Five (5) percent (5 %);
- 3 Subtract the aggregate of previous payments made by the Owner; and
- 4 Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Paragraph 9.5 of AIA Document A201-1997.

5.1.7 The progress payment amount determined in accordance with Subparagraph 5.1.6 shall be further modified under the following circumstances:

- 1 Add, upon Substantial Completion of the Work, a sum sufficient to increase the total payments to the full amount of the Contract Sum, less such amounts as the Architect shall determine for incomplete Work, retainage applicable to such work and unsettled claims; and (Subparagraph 9.8.5 of AIA Document A201-1997 requires release of applicable retainage upon Substantial Completion of Work with consent of surety, if any.)
- 2 Add, if final completion of the Work is thereafter materially delayed through no fault of the Contractor, any additional amounts payable in accordance with Subparagraph 9.10.3 of AIA Document A201-1997.

5.1.8 Reduction or limitation of retainage, if any, shall be as follows:

(If it is intended, prior to Substantial Completion of the entire Work, to reduce or limit the retainage resulting from the percentages inserted in Clauses 5.1.6.1 and 5.1.6.2 above, and this is not explained elsewhere in the Contract Documents, insert here provisions for such reduction or limitation.)

5.1.9 Except with the Owner's prior approval, the Contractor shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

5.2 FINAL PAYMENT

5.2.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when:

- 1 the Contractor has fully performed the Contract except for the Contractor's responsibility to correct Work as provided in Subparagraph 12.2.2 of AIA Document A201-1997, and to satisfy other requirements, if any, which extend beyond final payment; and
- 2 a final Certificate for Payment has been issued by the Architect.



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5.2.2 The Owner's final payment to the Contractor shall be made no later than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:

ARTICLE 6 TERMINATION OR SUSPENSION

6.1 The Contract may be terminated by the Owner or the Contractor as provided in Article 14 of AIA Document A201-1997.

6.2 The Work may be suspended by the Owner as provided in Article 14 of AIA Document A201-1997.

ARTICLE 7 MISCELLANEOUS PROVISIONS

7.1 Where reference is made in this Agreement to a provision of AIA Document A201-1997 or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents.

7.2 Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

(Insert rate of interest agreed upon, if any.)

(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Contractor's principal places of business, the location of the Project and elsewhere may affect the validity of this provision. Legal advice should be obtained with respect to deletions or modifications, and also regarding requirements such as written disclosures or waivers.)

7.3 The Owner's representative is:
(Name, address and other information)

Stuart Utgard
7035 South 185 West
Midvale, UT. 84047

7.4 The Contractor's representative is:
(Name, address and other information)

Gary L. Eckman
3032 South 1030 West
Salt Lake City, UT. 84119

7.5 Neither the Owner's nor the Contractor's representative shall be changed without ten days' written notice to the other party.

7.6 Other provisions:



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ARTICLE 8 ENUMERATION OF CONTRACT DOCUMENTS

8.1 The Contract Documents, except for Modifications issued after execution of this Agreement, are enumerated as follows:

8.1.1 The Agreement is this executed 1997 edition of the Standard Form of Agreement Between Owner and Contractor, AIA Document A101-1997.

8.1.2 The General Conditions are the 1997 edition of the General Conditions of the Contract for Construction, AIA Document A201-1997.

8.1.3 The Supplementary and other Conditions of the Contract are those contained in the Project Manual dated _____, and are as follows:

Document	Title	Pages
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N / A

8.1.4 The Specifications are those contained in the Project Manual dated as in Subparagraph 8.1.3, and are as follows:

(Either list the Specifications here or refer to an exhibit attached to this Agreement.)

Section	Title	Pages
---------	-------	-------

SEE EXHIBIT "A" (Attached)

8.1.5 The Drawings are as follows, and are dated _____ unless a different date is shown below:

(Either list the Drawings here or refer to an exhibit attached to this Agreement.)

Number	Title	Date
--------	-------	------

SEE EXHIBIT "B" (Attached)



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8.1.6 The Addenda, if any, are as follows:

Number	Date	Pages
--------	------	-------

EXHIBIT "C" (Attached)

Portions of Addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 8.

8.1.7 Other documents, if any, forming part of the Contract Documents are as follows:
(List here any additional documents that are intended to form part of the Contract Documents. AIA Document A201-1997 provides that bidding requirements such as advertisement or invitation to bid, Instructions to Bidders, sample forms and the Contractor's bid are not part of the Contract Documents unless enumerated in this Agreement. They should be listed here only if intended to be part of the Contract Documents.)

Construction Schedule

Exhibit "E" (Cost Breakdown)

This Agreement is entered into as of the day and year first written above and is executed in at least three original copies, of which one is to be delivered to the Contractor, one to the Architect for use in the administration of the Contract, and the remainder to the Owner.


OWNER (Signature)


CONTRACTOR (Signature)

STUART B. UTGARD
(Printed name and title)

Stuart Utgard

GARY L. ECKMAN
(Printed name and title)

Gary L. Eckman

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INSTRUCTIONS

Exhibit No. 2
Date: 10 16 09
Arrington
T&T REPORTING

AIA DOCUMENT A201-1997

General Conditions of the Contract for Construction

GENERAL INFORMATION

PURPOSE. This Agreement A201-1997, a general conditions form, is intended to be used as one of the contract documents forming the construction contract. In addition, it is frequently adopted by reference into a variety of other documents, including the Owner-Architect agreements and the Contractor-Subcontractor agreements, to establish a common basis for primary and secondary relationships on the typical construction project.

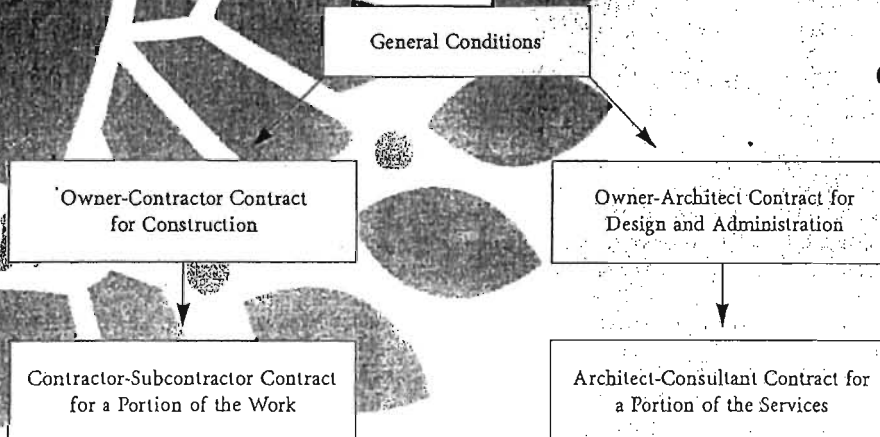
RELATED DOCUMENTS. A201-1997 is incorporated by reference into two AIA Owner-Contractor agreements (A191-1997 and A192-1997), the AIA Owner-Architect agreement and several AIA Owner-Architect agreements (A193-1997 and A194-1997). It is also incorporated by reference into two design-build agreements (A195-Part 1 and A195-Part 2) and two Owner-Contractor/Manager/constructor agreements (A121/CMc-Part 2 and A121/CMc-Part 3). A201-1997 may be adopted by reference when the prime Agreement between the Owner and Architect is A201-1997 and it is then adopted into Architect-Consultant agreements such as AIA Documents A202-1997 and A203-1997. Such incorporation by reference is a valid legal drafting method, and documents so incorporated are generally considered a part of the contract.

This contract document, including A201-1997, is the contract for Construction between the Owner and the Contractor. The other contract documents, including the Owner-Architect Agreement (A201-1997 or A111-1997), are separate contracts.

Supplementary Conditions
Drawings
Specifications
Modifications

Notwithstanding, AIA does not provide standards for Supplementary Conditions, Drawings or Specifications, and it is the responsibility of the Architect to provide standards, including AIA's MASTERSPEC and AIA Document A511, Guide for Supplementary Conditions.

This contract document is intended to be a contract coordinating the many parties involved in the construction process. It is intended to be a contract that is a vital document used to allocate the proper responsibilities to the parties.



* 4, 5, 40, 41
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On construction projects, hundreds of contractual relationships are created between owners, architects, architects' consultants, contractors, subcontractors, sub-subcontractors, and others down through the multiple tiers of participants. If custom-crafted agreements were written in isolation for each of those contractual relationships, the problems of overlaps and gaps in the numerous participants' responsibilities could lead to mass confusion and chaos. To prevent and solve this problem, the construction industry commonly uses standardized general conditions, such as AIA Document A201-1997, for coordinating those many relationships on the project by its adoption into each contract. AIA expends a great deal of time and resources in the development of A201 and its other documents to provide four types of linkages in the tiers of legal relationships. In addition to adoption of A201 into each agreement, related AIA documents are crafted with common phrasing, uniform definitions and a consistent, logical allocation of responsibilities down through the tiers of relationships. Together these documents are known as the A201 Family of Documents, and are listed below:

- A101-1997, Standard Form of Agreement Between Owner and Contractor (Stipulated Sum)
- A111-1997, Standard Form of Agreement Between Owner and Contractor (Cost Plus Fee, with GMP)
- A401-1997, Standard Form of Agreement Between Contractor and Subcontractor
- A511, Guide for Supplementary Conditions
- A701-1997, Instructions to Bidders
- B141-1997, Standard Form of Agreement Between Owner and Architect
- B151-1997, Abbreviated Standard Form of Agreement Between Owner and Architect
- B511, Guide for Amendments to AIA Owner-Architect Agreements
- C141-1997, Standard Form of Agreement Between Architect and Consultant
- C142-1997, Abbreviated Standard Form of Agreement Between Architect and Consultant

The AIA publishes other General Conditions that parallel A201-1997 for the construction management-adviser family of documents (AIA Document A201/CMA) and the interiors family of documents (AIA Document A271).

DISPUTE RESOLUTION—MEDIATION AND ARBITRATION. This document contains provisions for mediation and arbitration of claims and disputes. Mediation is a non-binding process, but is mandatory under the terms of this document. Arbitration is mandatory under the terms of this document and binding in most states and under the Federal Arbitration Act. In a minority of states, arbitration provisions relating to future disputes are not enforceable but the parties may agree to arbitrate after the dispute arises. Even in those states, under certain circumstances (for example, in a transaction involving interstate commerce), arbitration provisions may be enforceable under the Federal Arbitration Act.

The AIA does not administer dispute resolution processes. To submit disputes to mediation or arbitration or to obtain copies of the applicable mediation or arbitration rules, write to the American Arbitration Association or call (800) 778-7879. The American Arbitration Association also may be contacted at <http://www.adr.org>.

WHY USE AIA CONTRACT DOCUMENTS? AIA contract documents are the product of a consensus-building process aimed at balancing the interests of all parties on the construction project. The documents reflect actual industry practices, not theory. They are state-of-the-art legal documents, regularly revised to keep up with changes in law and the industry—yet they are written, as far as possible, in everyday language. Finally, AIA contract documents are flexible: they are intended to be modified to fit individual projects, but in such a way that modifications are easily distinguished from the original, printed language.

For further information on AIA's approach to drafting contract documents, see AIA Document M120, Document Drafting Principles.

USE OF NON-AIA FORMS. If a combination of AIA documents and non-AIA documents is to be used, particular care must be taken to achieve consistency of language and intent among documents.

STANDARD FORMS. Most AIA documents published since 1906 have contained in their titles the words "Standard Form." The term "standard" is not meant to imply that a uniform set of contractual requirements is mandatory for AIA members or others in the construction industry. Rather, the AIA standard documents are intended to be used as fair and balanced baselines from which the parties can negotiate their bargains. As such, the documents have won general acceptance within the construction industry and have been uniformly interpreted by the courts. Within an industry spanning 50 states—each free to adopt different, and perhaps contradictory, laws affecting that industry—AIA documents form the basis for a generally consistent body of construction law.

USE OF CURRENT DOCUMENTS. Prior to using any AIA document, the user should consult an AIA component chapter or a current AIA Documents Price List to determine the current edition of each document.



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This document may not be reproduced for Project Manuals. Rather, if a user wishes to include it as an example in a Project Manual, the normal practice is to purchase a quantity of the original forms and bind one in each of the Project Manuals. Modifications may be accomplished through the use of separate Supplementary Conditions, such as those derived from AIA Document A511.

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CHANGES FROM THE PREVIOUS EDITION

AIA Document A201-1997 revises the 1997 edition of A201 to reflect changes in construction industry practices and the law. Comments and assistance in this revision were received from numerous individuals and organizations, including those representing owners, architects, engineers, specialty general contractors, subcontractors, independent insurance agents, sureties, attorneys and arbitrators.

A number of substantial changes have been made to the A201-1997 document. The principal changes are described below.

ARTICLE 1: Protection of rights in Drawings, Specifications and other documents is now specifically extended to those of the Architect's consultants and includes documents in electronic form.

ARTICLE 2: The Owner is required to designate a representative empowered to act for the Owner on the Project. The contractor is entitled to rely on the accuracy and completeness of information furnished by the Owner.

ARTICLE 3: Procedures are given for contractor review of field conditions and for review of instructions in the Contract Documents regarding construction means and methods. The rights and responsibilities of the parties with respect to intellectual design by the Contractor are set out in detail.

ARTICLE 4: Mediation is included as a precursor to arbitration. The Owner and Contractor waive consequential damages (i.e., indirect damages) arising out of the Contract.

ARTICLE 7: Amounts not in dispute under a Construction Change Directive must be included in Applications for Payment; internal determinations as to amounts still in dispute will be made by the Architect.

ARTICLE 9: In the absence of a payment bond, the full amount of the contract sum, payments received by the Contractor for the work of subcontractors are held by the Contractor for the subcontractors. Release of retainage on completed work is required at substantial completion.

ARTICLE 10: Hazardous materials provisions have been expanded to cover materials other than asbestos and PCB, and indemnification of the Contractor under these provisions has been amended to cover remediation costs.

ARTICLE 11: Project Management Protective Liability insurance covers the risks of the Owner, Contractor and Architect, as well as an option for the parties to the Contract.

ARTICLE 12: If, during the construction period, the Owner discovers Work that is not in accordance with the Contract Documents, the Owner must notify the Contractor. Failure to do so results in a waiver of the Owner's rights under the correction of Work and Warranty provisions.

ARTICLE 13: The Owner is permitted to assign the Contract to a lender without consent of the Contractor.

ARTICLE 14: The Owner is permitted to terminate the Contract for convenience, with appropriate payment to the Contractor.

USING THE A201-1997 FORM

MODIFICATIONS. Users are encouraged to consult an attorney before completing an AIA document. Particularly with respect to contractor's licensing laws, duties imposed by building codes, interest charges, arbitration and indemnification, this document may require modification with the assistance of legal counsel to fully comply with state or local laws regulating these matters.

Generally, necessary modifications to the General Conditions may be accomplished by Supplementary Conditions included in the Project Manual and referenced in the Owner-Contractor Agreement. See AIA Document A511, Guide for Supplementary Conditions, for model provisions and suggested format for the Supplementary Conditions.



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Because A201-1997 is designed for general usage, it does not provide all the information and legal requirements needed for a specific Project and location. Necessary additional requirements must be provided in the other Contract Documents, such as the Supplementary Conditions. Consult AIA Document A521, Uniform Location of Subject Matter, to determine the proper location for such additional stipulations.

It is definitely not recommended practice to retype the standard document. Besides being a violation of copyright, retyping can introduce typographical errors and cloud the legal interpretation given to a standard clause when blended with modifications, thereby eliminating one of the principal advantages of standard form documents. By merely reviewing the modifications to be made to a standard form document, parties familiar with that document can quickly understand the essence of the proposed relationship. Commercial exchanges are greatly simplified and expedited, good-faith dealing is encouraged, and otherwise latent clauses are exposed for scrutiny. In this way, contracting parties can more confidently and fairly measure their risks.



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AIA DOCUMENT A201-1997**General Conditions of the Contract for Construction****TABLE OF ARTICLES**

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This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

This document has been approved and endorsed by The Associated General Contractors of America.



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GENERAL CONDITIONS
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1735 New York Avenue, N.W.
Washington, D.C. 20006-5292



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GENERAL CONDITIONS
OF THE CONTRACT FOR
CONSTRUCTION

The American Institute
of Architects
1735 New York Avenue, N.W.
Washington, D.C. 20006-5292

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ARTICLE 1 GENERAL PROVISIONS

1.1 BASIC DEFINITIONS

1.1.1 THE CONTRACT DOCUMENTS

The Contract Documents consist of the Agreement between Owner and Contractor (hereinafter the Agreement), Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of the Contract, other documents listed in the Agreement and Modifications issued after execution of the Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include other documents such as bidding requirements (advertisement or invitation to bid, Instructions to Bidders, sample forms, the Contractor's bid or portions of Addenda relating to bidding requirements).

1.1.2 THE CONTRACT

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or Sub-subcontractor, (3) between the Owner and Architect or (4) between any persons or entities other than the Owner and Contractor. The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's duties.

1.1.3 THE WORK

The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

1.1.4 THE PROJECT

The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner or by separate contractors.

1.1.5 THE DRAWINGS

The Drawings are the graphic and pictorial portions of the Contract Documents showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules and diagrams.

1.1.6 THE SPECIFICATIONS

The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services.

1.1.7 THE PROJECT MANUAL

The Project Manual is a volume assembled for the Work which may include the bidding requirements, sample forms, Conditions of the Contract and Specifications.

1.2 CORRELATION AND INTENT OF THE CONTRACT DOCUMENTS

1.2.1 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are



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complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.

1.2.2 Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

1.2.3 Unless otherwise stated in the Contract Documents, words which have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

1.3 CAPITALIZATION

1.3.1 Terms capitalized in these General Conditions include those which are (1) specifically defined, (2) the titles of numbered articles and identified references to Paragraphs, Subparagraphs and Clauses in the document or (3) the titles of other documents published by the American Institute of Architects.

1.4 INTERPRETATION

1.4.1 In the interest of brevity the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

1.5 EXECUTION OF CONTRACT DOCUMENTS

1.5.1 The Contract Documents shall be signed by the Owner and Contractor. If either the Owner or Contractor or both do not sign all the Contract Documents, the Architect shall identify such unsigned Documents upon request.

1.5.2 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

1.6 OWNERSHIP AND USE OF DRAWINGS, SPECIFICATIONS AND OTHER INSTRUMENTS OF SERVICE

1.6.1 The Drawings, Specifications and other documents, including those in electronic form, prepared by the Architect and the Architect's consultants are Instruments of Service through which the Work to be executed by the Contractor is described. The Contractor may retain one record set. Neither the Contractor nor any Subcontractor, Sub-subcontractor or material or equipment supplier shall own or claim a copyright in the Drawings, Specifications and other documents prepared by the Architect or the Architect's consultants, and unless otherwise indicated the Architect and the Architect's consultants shall be deemed the authors of them and will retain all common law, statutory and other reserved rights, in addition to the copyrights. All copies of Instruments of Service, except the Contractor's record set, shall be returned or suitably accounted for to the Architect, on request, upon completion of the Work. The Drawings, Specifications and other documents prepared by the Architect and the Architect's consultants, and copies thereof furnished to the Contractor, are for use solely with respect to this Project. They are not to be used by the Contractor or any Subcontractor, Sub-subcontractor or material or equipment supplier on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner, Architect and the Architect's consultants. The Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers are authorized to use and reproduce applicable portions of the Drawings, Specifications and other documents prepared by the Architect and the Architect's consultants appropriate to and for use in



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the execution of their Work under the Contract Documents. All copies made under this authorization shall bear the statutory copyright notice, if any, shown on the Drawings, Specifications and other documents prepared by the Architect and the Architect's consultants. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Architect's or Architect's consultants' copyrights or other reserved rights.

ARTICLE 2 OWNER

2.1 GENERAL

2.1.1 The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. Except as otherwise provided in Subparagraph 4.2.1, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

2.1.2 The Owner shall furnish to the Contractor within fifteen days after receipt of a written request, information necessary and relevant for the Contractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein.

2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER

2.2.1 The Owner shall, at the written request of the Contractor, prior to commencement of the Work and thereafter, furnish to the Contractor reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. Furnishing of such evidence shall be a condition precedent to commencement or continuation of the Work. After such evidence has been furnished, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

2.2.2 Except for permits and fees, including those required under Subparagraph 3.7.1, which are the responsibility of the Contractor under the Contract Documents, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

2.2.3 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

2.2.4 Information or services required of the Owner by the Contract Documents shall be furnished by the Owner with reasonable promptness. Any other information or services relevant to the Contractor's performance of the Work under the Owner's control shall be furnished by the Owner after receipt from the Contractor of a written request for such information or services.

2.2.5 Unless otherwise provided in the Contract Documents, the Contractor will be furnished, free of charge, such copies of Drawings and Project Manuals as are reasonably necessary for execution of the Work.

2.3 OWNER'S RIGHT TO STOP THE WORK

2.3.1 If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents as required by Paragraph 12.2 or persistently fails to carry out Work in



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accordance with the Contract Documents, the Owner may issue a written order to the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the extent required by Subparagraph 6.1.3.

2.4 OWNER'S RIGHT TO CARRY OUT THE WORK

2.4.1 If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a seven-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may after such seven-day period give the Contractor a second written notice to correct such deficiencies within a three-day period. If the Contractor within such three-day period after receipt of such second notice fails to commence and continue to correct any deficiencies, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies, including Owner's expenses and compensation for the Architect's additional services made necessary by such default, neglect or failure. Such action by the Owner and amounts charged to the Contractor are both subject to prior approval of the Architect. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.

ARTICLE 3 CONTRACTOR

3.1 GENERAL

3.1.1 The Contractor is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Contractor" means the Contractor or the Contractor's authorized representative.

3.1.2 The Contractor shall perform the Work in accordance with the Contract Documents.

3.1.3 The Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons other than the Contractor.

3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

3.2.1 Since the Contract Documents are complementary, before starting each portion of the Work, the Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Subparagraph 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, any errors, inconsistencies or omissions discovered by the Contractor shall be reported promptly to the Architect as a request for information in such form as the Architect may require.

3.2.2 Any design errors or omissions noted by the Contractor during this review shall be reported promptly to the Architect, but it is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional unless otherwise specifically provided in the Contract Documents. The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations, but any nonconformity discovered by or made known to the Contractor shall be reported promptly to the Architect.



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3.2.3 If the Contractor believes that additional cost or time is involved because of clarifications or instructions issued by the Architect in response to the Contractor's notices or requests for information pursuant to Subparagraphs 3.2.1 and 3.2.2, the Contractor shall make Claims as provided in Subparagraphs 4.3.6 and 4.3.7. If the Contractor fails to perform the obligations of Subparagraphs 3.2.1 and 3.2.2, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations. The Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents or for differences between field measurements or conditions and the Contract Documents unless the Contractor recognized such error, inconsistency, omission or difference and knowingly failed to report it to the Architect.

3.3 SUPERVISION AND CONSTRUCTION PROCEDURES

3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect. If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any resulting loss or damage.

3.3.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors.

3.3.3 The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.

3.4 LABOR AND MATERIALS

3.4.1 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

3.4.2 The Contractor may make substitutions only with the consent of the Owner, after evaluation by the Architect and in accordance with a Change Order.

3.4.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

3.5 WARRANTY

3.5.1 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract



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Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

3.6 TAXES

3.6.1 The Contractor shall pay sales, consumer, use and similar taxes for the Work provided by the Contractor which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

3.7 PERMITS, FEES AND NOTICES

3.7.1 Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit and other permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work which are customarily secured after execution of the Contract and which are legally required when bids are received or negotiations concluded.

3.7.2 The Contractor shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities applicable to performance of the Work.

3.7.3 It is not the Contractor's responsibility to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations. However, if the Contractor observes that portions of the Contract Documents are at variance therewith, the Contractor shall promptly notify the Architect and Owner in writing, and necessary changes shall be accomplished by appropriate Modification.

3.7.4 If the Contractor performs Work knowing it to be contrary to laws, statutes, ordinances, building codes, and rules and regulations without such notice to the Architect and Owner, the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.

3.8 ALLOWANCES

3.8.1 The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

3.8.2 Unless otherwise provided in the Contract Documents:

1. allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;
2. Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum but not in the allowances;
3. whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Clause 3.8.2.1 and (2) changes in Contractor's costs under Clause 3.8.2.2.

3.8.3 Materials and equipment under an allowance shall be selected by the Owner in sufficient time to avoid delay in the Work.



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3.9 SUPERINTENDENT

3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor. Important communications shall be confirmed in writing. Other communications shall be similarly confirmed on written request in each case.

3.10 CONTRACTOR'S CONSTRUCTION SCHEDULES

3.10.1 The Contractor, promptly after being awarded the Contract, shall prepare and submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work.

3.10.2 The Contractor shall prepare and keep current, for the Architect's approval, a schedule of submittals which is coordinated with the Contractor's construction schedule and allows the Architect reasonable time to review submittals.

3.10.3 The Contractor shall perform the Work in general accordance with the most recent schedules submitted to the Owner and Architect.

3.11 DOCUMENTS AND SAMPLES AT THE SITE

3.11.1 The Contractor shall maintain at the site for the Owner one record copy of the Drawings, Specifications, Addenda, Change Orders and other Modifications, in good order and marked currently to record field changes and selections made during construction, and one record copy of approved Shop Drawings, Product Data, Samples and similar required submittals. These shall be available to the Architect and shall be delivered to the Architect for submittal to the Owner upon completion of the Work.

3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES

3.12.1 Shop Drawings are drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

3.12.3 Samples are physical examples which illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

3.12.4 Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. The purpose of their submittal is to demonstrate for those portions of the Work for which submittals are required by the Contract Documents the way by which the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents. Review by the Architect is subject to the limitations of Subparagraph 4.2.7. Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents. Submittals which are not required by the Contract Documents may be returned by the Architect without action.

3.12.5 The Contractor shall review for compliance with the Contract Documents, approve and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by



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the Contract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate contractors. Submittals which are not marked as reviewed for compliance with the Contract Documents and approved by the Contractor may be returned by the Architect without action.

3.12.6 By approving and submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents that the Contractor has determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

3.12.7 The Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved by the Architect.

3.12.8 The Work shall be in accordance with approved submittals except that the Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Architect's approval of Shop Drawings, Product Data, Samples or similar submittals unless the Contractor has specifically informed the Architect in writing of such deviation at the time of submittal and (1) the Architect has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Architect's approval thereof.

3.12.9 The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by the Architect on previous submittals. In the absence of such written notice the Architect's approval of a resubmission shall not apply to such revisions.

3.12.10 The Contractor shall not be required to provide professional services which constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. The Contractor shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals, provided the Owner and Architect have specified to the Contractor all performance and design criteria that such services must satisfy. Pursuant to this Subparagraph 3.12.10, the Architect will review, approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy of the performance or design criteria required by the Contract Documents.



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3.13 USE OF SITE

3.13.1 The Contractor shall confine operations at the site to areas permitted by law, ordinances, permits and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

3.14 CUTTING AND PATCHING

3.14.1 The Contractor shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly.

3.14.2 The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter such construction by the Owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold from the Owner or a separate contractor the Contractor's consent to cutting or otherwise altering the Work.

3.15 CLEANING UP

3.15.1 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials.

3.15.2 If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and the cost thereof shall be charged to the Contractor.

3.16 ACCESS TO WORK

3.16.1 The Contractor shall provide the Owner and Architect access to the Work in preparation and progress wherever located.

3.17 ROYALTIES, PATENTS AND COPYRIGHTS

3.17.1 The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and Architect harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents or where the copyright violations are contained in Drawings, Specifications or other documents prepared by the Owner or Architect. However, if the Contractor has reason to believe that the required design, process or product is an infringement of a copyright or a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the Architect.

3.18 INDEMNIFICATION

3.18.1 To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by the Contractor in accordance with Paragraph 11.3, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be



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construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.

3.18.2 In claims against any person or entity indemnified under this Paragraph 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Subparagraph 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

ARTICLE 4 ADMINISTRATION OF THE CONTRACT

4.1 ARCHITECT

4.1.1 The Architect is the person lawfully licensed to practice architecture or an entity lawfully practicing architecture identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Architect" means the Architect or the Architect's authorized representative.

4.1.2 Duties, responsibilities and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified or extended without written consent of the Owner, Contractor and Architect. Consent shall not be unreasonably withheld.

4.1.3 If the employment of the Architect is terminated, the Owner shall employ a new Architect against whom the Contractor has no reasonable objection and whose status under the Contract Documents shall be that of the former Architect.

4.2 ARCHITECT'S ADMINISTRATION OF THE CONTRACT

4.2.1 The Architect will provide administration of the Contract as described in the Contract Documents, and will be an Owner's representative (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the one-year period for correction of Work described in Paragraph 12.2. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents, unless otherwise modified in writing in accordance with other provisions of the Contract.

4.2.2 The Architect, as a representative of the Owner, will visit the site at intervals appropriate to the stage of the Contractor's operations (1) to become generally familiar with and to keep the Owner informed about the progress and quality of the portion of the Work completed, (2) to endeavor to guard the Owner against defects and deficiencies in the Work, and (3) to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents, except as provided in Subparagraph 3.3.1.

4.2.3 The Architect will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect will not have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.



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4.2.4 Communications Facilitating Contract Administration. Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the Owner and Contractor shall endeavor to communicate with each other through the Architect about matters arising out of or relating to the Contract. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner.

4.2.5 Based on the Architect's evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

4.2.6 The Architect will have authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect will have authority to require inspection or testing of the Work in accordance with Subparagraphs 13.5.2 and 13.5.3, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

4.2.7 The Architect will review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect's action will be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Contractor or separate contractors, while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review of the Contractor's submittals shall not relieve the Contractor of the obligations under Paragraphs 3.3, 3.5 and 3.12. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

4.2.8 The Architect will prepare Change Orders and Construction Change Directives, and may authorize minor changes in the Work as provided in Paragraph 7.4.

4.2.9 The Architect will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion; will receive and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract and assembled by the Contractor; and will issue a final Certificate for Payment upon compliance with the requirements of the Contract Documents.

4.2.10 If the Owner and Architect agree, the Architect will provide one or more project representatives to assist in carrying out the Architect's responsibilities at the site. The duties, responsibilities and limitations of authority of such project representatives shall be as set forth in an exhibit to be incorporated in the Contract Documents.

4.2.11 The Architect will interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor.



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The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness. If no agreement is made concerning the time within which interpretations required of the Architect shall be furnished in compliance with this Paragraph 4.2, then delay shall not be recognized on account of failure by the Architect to furnish such interpretations until 15 days after written request is made for them.

4.2.12 Interpretations and decisions of the Architect will be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and initial decisions, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either and will not be liable for results of interpretations or decisions so rendered in good faith.

4.2.13 The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

4.3 CLAIMS AND DISPUTES

4.3.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

4.3.2 Time Limits on Claims. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party.

4.3.3 Continuing Contract Performance. Pending final resolution of a Claim except as otherwise agreed in writing or as provided in Subparagraph 9.7.1 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

4.3.4 Claims for Concealed or Unknown Conditions. If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted, but if the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.4.



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4.3.5 Claims for Additional Cost. If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Paragraph 10.6.

4.3.6 If the Contractor believes additional cost is involved for reasons including but not limited to (1) a written interpretation from the Architect, (2) an order by the Owner to stop the Work where the Contractor was not at fault, (3) a written order for a minor change in the Work issued by the Architect, (4) failure of payment by the Owner, (5) termination of the Contract by the Owner, (6) Owner's suspension or (7) other reasonable grounds, Claim shall be filed in accordance with this Paragraph 4.3.

4.3.7 CLAIMS FOR ADDITIONAL TIME

4.3.7.1 If the Contractor wishes to make Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay only one Claim is necessary.

4.3.7.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an adverse effect on the scheduled construction.

4.3.8 Injury or Damage to Person or Property. If either party to the Contract suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

4.3.9 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Construction Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

4.3.10 Claims for Consequential Damages. The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

1. damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
2. damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Subparagraph 4.3.10 shall be deemed to preclude an award of liquidated direct damages, when applicable, in accordance with the requirements of the Contract Documents.

14 RESOLUTION OF CLAIMS AND DISPUTES

14.1 Decision of Architect. Claims, including those alleging an error or omission by the Architect but excluding those arising under Paragraphs 10.3 through 10.5, shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a



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condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect. The Architect will not decide disputes between the Contractor and persons or entities other than the Owner.

4.4.2 The Architect will review Claims and within ten days of the receipt of the Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Architect is unable to resolve the Claim if the Architect lacks sufficient information to evaluate the merits of the Claim or if the Architect concludes that, in the Architect's sole discretion, it would be inappropriate for the Architect to resolve the Claim.

4.4.3 In evaluating Claims, the Architect may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Architect in rendering a decision. The Architect may request the Owner to authorize retention of such persons at the Owner's expense.

4.4.4 If the Architect requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of such request, and shall either provide a response on the requested supporting data, advise the Architect when the response or supporting data will be furnished or advise the Architect that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Architect will either reject or approve the Claim in whole or in part.

4.4.5 The Architect will approve or reject Claims by written decision, which shall state the reasons therefor and which shall notify the parties of any change in the Contract Sum or Contract Time or both. The approval or rejection of a Claim by the Architect shall be final and binding on the parties but subject to mediation and arbitration.

4.4.6 When a written decision of the Architect states that (1) the decision is final but subject to mediation and arbitration and (2) a demand for arbitration of a Claim covered by such decision must be made within 30 days after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said 30 days' period shall result in the Architect's decision becoming final and binding upon the Owner and Contractor. If the Architect renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence, but shall not supersede arbitration proceedings unless the decision is acceptable to all parties concerned.

4.4.7 Upon receipt of a Claim against the Contractor or at any time thereafter, the Architect or the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the Architect or the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

4.4.8 If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the Claim by the Architect, by mediation or by arbitration.

4.5 MEDIATION

4.5.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5 shall, after initial decision by the Architect or 30 days after submission of the Claim to the Architect, be



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subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

4.5.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to the Contract and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

4.5.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

4.6 ARBITRATION

4.6.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5, shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Paragraph 4.5.

4.6.2 Claims not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect.

4.6.3 A demand for arbitration shall be made within the time limits specified in Subparagraphs 4.4.6 and 4.6.1 as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.

4.6.4 Limitation on Consolidation or Joinder. No arbitration arising out of or relating to the Contract shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Contractor or a separate contractor as described in Article 6 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a Claim not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.



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4.6.5 Claims and Timely Assertion of Claims. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

4.6.6 Judgment on Final Award. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

ARTICLE 5 SUBCONTRACTORS

5.1 DEFINITIONS

5.1.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a separate contractor or subcontractors of a separate contractor.

5.1.2 A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site. The term "Sub-subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor or an authorized representative of the Sub-subcontractor.

5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK

5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Architect will promptly reply to the Contractor in writing stating whether or not the Owner or the Architect, after due investigation, has reasonable objection to any such proposed person or entity. Failure of the Owner or Architect to reply promptly shall constitute notice of no reasonable objection.

5.2.2 The Contractor shall not contract with a proposed person or entity to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

5.2.3 If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Architect has no reasonable objection. If the proposed but rejected Subcontractor was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

5.2.4 The Contractor shall not change a Subcontractor, person or entity previously selected if the Owner or Architect makes reasonable objection to such substitute.

5.3 SUBCONTRACTUAL RELATIONS

5.3.1 By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the



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Subcontractor's Work, which the Contractor, by these Documents, assumes toward the Owner and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement which may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

5.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS

5.4.1 Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner provided that:

- 1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Paragraph 14.2 and only for those subcontract agreements which the Owner accepts by notifying the Subcontractor and Contractor in writing; and
- 2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

5.4.2 Upon such assignment, if the Work has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted for increases in cost resulting from the suspension.

ARTICLE 6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

6.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS

6.1.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under Conditions of the Contract identical or substantially similar to these including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such Claim as provided in Paragraph 4.3.

6.1.2 When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

6.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with other separate contractors and the Owner in reviewing their construction schedules when directed to do so. The Contractor shall make any revisions to the construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, separate contractors and the Owner until subsequently revised.

6.1.4 Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces, the Owner shall be deemed to be subject to the same obligations and to have the same rights which apply to the



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Contractor under the Conditions of the Contract, including, without excluding others, those stated in Article 3, this Article 6 and Articles 10, 11 and 12.

6.2 MUTUAL RESPONSIBILITY

6.2.1 The Contractor shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Architect apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Contractor so to report shall constitute an acknowledgment that the Owner's or separate contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

6.2.3 The Owner shall be reimbursed by the Contractor for costs incurred by the Owner which are payable to a separate contractor because of delays, improperly timed activities or defective construction of the Contractor. The Owner shall be responsible to the Contractor for costs incurred by the Contractor because of delays, improperly timed activities, damage to the Work or defective construction of a separate contractor.

6.2.4 The Contractor shall promptly remedy damage wrongfully caused by the Contractor to completed or partially completed construction or to property of the Owner or separate contractors as provided in Subparagraph 10.2.5.

6.2.5 The Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Subparagraph 3.14.

6.3 OWNER'S RIGHT TO CLEAN UP

6.3.1 If a dispute arises among the Contractor, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and the Architect will allocate the cost among those responsible.

ARTICLE 7 CHANGES IN THE WORK

7.1 GENERAL

7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor and Architect; a Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Architect alone.

7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work.



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7.2 CHANGE ORDERS

7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect, stating their agreement upon all of the following:

- 1 change in the Work;
- 2 the amount of the adjustment, if any, in the Contract Sum; and
- 3 the extent of the adjustment, if any, in the Contract Time.

7.2.2 Methods used in determining adjustments to the Contract Sum may include those listed in Subparagraph 7.3.3.

7.3 CONSTRUCTION CHANGE DIRECTIVES

7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

- 1 mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
- 2 unit prices stated in the Contract Documents or subsequently agreed upon;
- 3 cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
- 4 as provided in Subparagraph 7.3.6.

7.3.4 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

7.3.5 A Construction Change Directive signed by the Contractor indicates the agreement of the Contractor therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

7.3.6 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the method and the adjustment shall be determined by the Architect on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, a reasonable allowance for overhead and profit. In such case, and also under Clause 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Subparagraph 7.3.6 shall be limited to the following:

- 1 costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance;
- 2 costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
- 3 rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;



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- .4 costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and
- .5 additional costs of supervision and field office personnel directly attributable to the change.

7.3.7. The amount of credit to be allowed by the Contractor to the Owner for a deletion or change which results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

7.3.8 Pending final determination of the total cost of a Construction Change Directive to the Owner, amounts not in dispute for such changes in the Work shall be included in Applications for Payment accompanied by a Change Order indicating the parties' agreement with part or all of such costs. For any portion of such cost that remains in dispute, the Architect will make an interim determination for purposes of monthly certification for payment for those costs. That determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a claim in accordance with Article 4.

7.3.9 When the Owner and Contractor agree with the determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order.

7.4 MINOR CHANGES IN THE WORK

7.4.1 The Architect will have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order and shall be binding on the Owner and Contractor. The Contractor shall carry out such written orders promptly.

ARTICLE 8 TIME

8.1 DEFINITIONS

8.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.

8.1.2 The date of commencement of the Work is the date established in the Agreement.

8.1.3 The date of Substantial Completion is the date certified by the Architect in accordance with Paragraph 9.8.

8.1.4 The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

8.2 PROGRESS AND COMPLETION

8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11 to be furnished by the Contractor and Owner. The date of commencement of the Work shall not be changed by the effective date of such insurance. Unless the date of commencement is established by the Contract Documents or a notice to proceed given



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by the Owner, the Contractor shall notify the Owner in writing not less than five days or other agreed period before commencing the Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

8.2.3 The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

8.3 DELAYS AND EXTENSIONS OF TIME

8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, or by delay authorized by the Owner pending mediation and arbitration, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Paragraph 4.3.

8.3.3 This Paragraph 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

ARTICLE 9 PAYMENTS AND COMPLETION

9.1 CONTRACT SUM

9.1.1 The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents.

9.2 SCHEDULE OF VALUES

9.2.1 Before the first Application for Payment, the Contractor shall submit to the Architect a schedule of values allocated to various portions of the Work, prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

9.3 APPLICATIONS FOR PAYMENT

9.3.1 At least ten days before the date established for each progress payment, the Contractor shall submit to the Architect an itemized Application for Payment for operations completed in accordance with the schedule of values. Such application shall be notarized, if required, and supported by such data substantiating the Contractor's right to payment as the Owner or Architect may require, such as copies of requisitions from Subcontractors and material suppliers, and reflecting retainage if provided for in the Contract Documents.

9.3.1.1 As provided in Subparagraph 7.3.8, such applications may include requests for payment on account of changes in the Work which have been properly authorized by Construction Change Directives, or by interim determinations of the Architect, but not yet included in Change Orders.

9.3.1.2 Such applications may not include requests for payment for portions of the Work for which the Contractor does not intend to pay to a Subcontractor or material supplier, unless such Work has been performed by others whom the Contractor intends to pay.



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9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

9.3.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.

9.4 CERTIFICATES FOR PAYMENT

9.4.1 The Architect will, within seven days after receipt of the Contractor's Application for Payment, either issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Architect determines is properly due, or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part as provided in Subparagraph 9.5.1.

9.4.2 The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluation of the Work and the data comprising the Application for Payment, that the Work has progressed to the point indicated and that, to the best of the Architect's knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion and to specific qualifications expressed by the Architect. The issuance of a Certificate for Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment will not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

9.5 DECISIONS TO WITHHOLD CERTIFICATION

9.5.1 The Architect may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Architect's opinion the representations to the Owner required by Subparagraph 9.4.2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and Owner as provided in Subparagraph 9.4.1. If the Contractor and Architect cannot agree on a revised amount, the Architect will promptly issue a Certificate for Payment for the amount for which the Architect is able to make such representations to the Owner. The Architect may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Architect's



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opinion to protect the Owner from loss for which the Contractor is responsible, including loss resulting from acts and omissions described in Subparagraph 3.3.2, because of:

- 1 defective Work not remedied;
- 2 third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the Contractor;
- 3 failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment;
- 4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
- 5 damage to the Owner or another contractor;
- 6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
- 7 persistent failure to carry out the Work in accordance with the Contract Documents.

9.5.2 When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

9.6 PROGRESS PAYMENTS

9.6.1 After the Architect has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Contract Documents, and shall so notify the Architect.

9.6.2 The Contractor shall promptly pay each Subcontractor, upon receipt of payment from the Owner, out of the amount paid to the Contractor on account of such Subcontractor's portion of the Work, the amount to which said Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of such Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-subcontractors in a similar manner.

9.6.3 The Architect will, on request, furnish to a Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Architect and Owner on account of portions of the Work done by such Subcontractor.

9.6.4 Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor except as may otherwise be required by law.

9.6.5 Payment to material suppliers shall be treated in a manner similar to that provided in Subparagraphs 9.6.2, 9.6.3 and 9.6.4.

9.6.6 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.

9.6.7 Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor for Work properly performed by Subcontractors and suppliers shall be held by the Contractor for those Subcontractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor, shall create any fiduciary liability or tort liability on the part of the Contractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor for breach of the requirements of this provision.



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9.7 FAILURE OF PAYMENT

9.7.1 If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents the amount certified by the Architect or awarded by arbitration, then the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents.

9.8 SUBSTANTIAL COMPLETION

9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

9.8.2 When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

9.8.3 Upon receipt of the Contractor's list, the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Architect's inspection discloses any item, whether or not included on the Contractor's list, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work or designated portion thereof for its intended use, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect. In such case, the Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion.

9.8.4 When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

9.8.5 The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate. Upon such acceptance and consent of surety, if any, the Owner shall make payment of retainage applying to such Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents.

9.9 PARTIAL OCCUPANCY OR USE

9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer as required under Clause 11.4.1.5 and authorized by public authorities having jurisdiction over the Work. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and



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have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Subparagraph 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect.

9.9.2 Immediately prior to such partial occupancy or use, the Owner, Contractor and Architect shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

9.9.3 Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

9.10 FINAL COMPLETION AND FINAL PAYMENT

9.10.1 Upon receipt of written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Subparagraph 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

9.10.2 Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment and (5), if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

9.10.3 If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that



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portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

9.10.4 The making of final payment shall constitute a waiver of Claims by the Owner except those arising from:

- .1 liens, Claims, security interests or encumbrances arising out of the Contract and unsettled;
- .2 failure of the Work to comply with the requirements of the Contract Documents; or
- .3 terms of special warranties required by the Contract Documents.

9.10.5 Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

10.1 SAFETY PRECAUTIONS AND PROGRAMS

10.1.1 The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.

10.2 SAFETY OF PERSONS AND PROPERTY

10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

- .1 employees on the Work and other persons who may be affected thereby;
- .2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and
- .3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

10.2.2 The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

10.2.3 The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

10.2.4 When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

10.2.5 The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Clauses 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Clauses 10.2.1.2 and 10.2.1.3, except damage or loss attributable to acts or omissions of the Owner or Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Paragraph 3.18.



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10.2.6 The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and Architect.

10.2.7 The Contractor shall not load or permit any part of the construction or site to be loaded so as to endanger its safety.

10.3 HAZARDOUS MATERIALS

10.3.1 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner and Architect in writing.

10.3.2 The Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to verify that it has been rendered harmless. Unless otherwise required by the Contract Documents, the Owner shall furnish in writing to the Contractor and Architect the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of such material or substance or who are to perform the task of removal or safe containment of such material or substance. The Contractor and the Architect will promptly reply to the Owner in writing stating whether or not either has reasonable objection to the persons or entities proposed by the Owner. If either the Contractor or Architect has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Contractor and the Architect have no reasonable objection. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. The Contract Time shall be extended appropriately and the Contract Sum shall be increased in the amount of the Contractor's reasonable additional costs of shut-down, delay and start-up, which adjustments shall be accomplished as provided in Article 7.

10.3.3 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Subparagraph 10.3.1 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) and provided that such damage, loss or expense is not due to the sole negligence of a party seeking indemnity.

10.4 The Owner shall not be responsible under Paragraph 10.3 for materials and substances brought to the site by the Contractor unless such materials or substances were required by the Contract Documents.

10.5 If, without negligence on the part of the Contractor, the Contractor is held liable for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall indemnify the Contractor for all cost and expense thereby incurred.

10.6 EMERGENCIES

10.6.1 In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Additional compensation or



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extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Paragraph 4.3 and Article 7.

ARTICLE 11 INSURANCE AND BONDS

11.1 CONTRACTOR'S LIABILITY INSURANCE

11.1.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

- .1 claims under workers' compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed;
- .2 claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;
- .3 claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;
- .4 claims for damages insured by usual personal injury liability coverage;
- .5 claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;
- .6 claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle;
- .7 claims for bodily injury or property damage arising out of completed operations; and
- .8 claims involving contractual liability insurance applicable to the Contractor's obligations under Paragraph 3.18.

11.1.2 The insurance required by Subparagraph 11.1.1 shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment.

11.1.3 Certificates of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work. These certificates and the insurance policies required by this Paragraph 11.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final Application for Payment as required by Subparagraph 9.10.2. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Contractor with reasonable promptness in accordance with the Contractor's information and belief.



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11.2 OWNER'S LIABILITY INSURANCE

11.2.1 The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance.

11.3 PROJECT MANAGEMENT PROTECTIVE LIABILITY INSURANCE

11.3.1 Optionally, the Owner may require the Contractor to purchase and maintain Project Management Protective Liability insurance from the Contractor's usual sources as primary coverage for the Owner's, Contractor's and Architect's vicarious liability for construction operations under the Contract. Unless otherwise required by the Contract Documents, the Owner

shall reimburse the Contractor by increasing the Contract Sum to pay the cost of purchasing and maintaining such optional insurance coverage, and the Contractor shall not be responsible for purchasing any other liability insurance on behalf of the Owner. The minimum limits of liability purchased with such coverage shall be equal to the aggregate of the limits required for Contractor's Liability Insurance under Clauses 11.1.1.2 through 11.1.1.5.

11.3.2 To the extent damages are covered by Project Management Protective Liability insurance, the Owner, Contractor and Architect waive all rights against each other for damages, except such rights as they may have to the proceeds of such insurance. The policy shall provide for such waivers of subrogation by endorsement or otherwise.

11.3.3 The Owner shall not require the Contractor to include the Owner, Architect or other persons or entities as additional insureds on the Contractor's Liability Insurance coverage under Paragraph 11.1.

11.4 PROPERTY INSURANCE

11.4.1 Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Paragraph 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Paragraph 11.4 to be covered, whichever is later. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project.

11.4.1.1 Property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's and Contractor's services and expenses required as a result of such insured loss.

11.4.1.2 If the Owner does not intend to purchase such property insurance required by the Contract and with all of the coverages in the amount described above, the Owner shall so inform the Contractor in writing prior to commencement of the Work. The Contractor may then effect insurance which will protect the interests of the Contractor, Subcontractors and Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain insurance as described above, without so notifying the Contractor in writing, then the Owner shall bear all reasonable costs properly attributable thereto.

11.4.1.3 If the property insurance requires deductibles, the Owner shall pay costs not covered because of such deductibles.

11.4.1.4 This property insurance shall cover portions of the Work stored off the site, and also portions of the Work in transit.

11.4.1.5 Partial occupancy or use in accordance with Paragraph 9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial



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occupancy or use by endorsement or otherwise. The Owner and the Contractor shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

11.4.2 Boiler and Machinery Insurance. The Owner shall purchase and maintain boiler and machinery insurance required by the Contract Documents or by law, which shall specifically cover such insured objects during installation and until final acceptance by the Owner; this insurance shall include interests of the Owner, Contractor, Subcontractors and Sub-subcontractors in the Work, and the Owner and Contractor shall be named insureds.

11.4.3 Loss of Use Insurance. The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. The Owner waives all rights of action against the Contractor for loss of use of the Owner's property, including consequential losses due to fire or other hazards however caused.

11.4.4 If the Contractor requests in writing that insurance for risks other than those described herein or other special causes of loss be included in the property insurance policy, the Owner shall, if possible, include such insurance, and the cost thereof shall be charged to the Contractor by appropriate Change Order.

11.4.5 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Subparagraph 11.4.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

11.4.6 Before an exposure to loss may occur, the Owner shall file with the Contractor a copy of each policy that includes insurance coverages required by this Paragraph 11.4. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be canceled or allowed to expire, and that its limits will not be reduced, until at least 30 days' prior written notice has been given to the Contractor.

11.4.7 Waivers of Subrogation. The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Paragraph 11.4 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.



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11.4.8 A loss insured under Owner's property insurance shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Subparagraph 11.4.10. The Contractor shall pay Subcontractors their just shares of insurance proceeds received by the Contractor, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to make payments to their Sub-subcontractors in similar manner.

11.4.9 If required in writing by a party in interest, the Owner as fiduciary shall, upon occurrence of an insured loss, give bond for proper performance of the Owner's duties. The cost of required bonds shall be charged against proceeds received as fiduciary. The Owner shall deposit in a separate account proceeds so received, which the Owner shall distribute in accordance with such agreement as the parties in interest may reach, or in accordance with an arbitration award in which case the procedure shall be as provided in Paragraph 4.6. If after such loss no other special agreement is made and unless the Owner terminates the Contract for convenience, replacement of damaged property shall be performed by the Contractor after notification of a Change in the Work in accordance with Article 7.

11.4.10 The Owner as fiduciary shall have power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing within five days after occurrence of loss to the Owner's exercise of this power; if such objection is made, the dispute shall be resolved as provided in Paragraphs 4.5 and 4.6. The Owner as fiduciary shall, in the case of arbitration, make settlement with insurers in accordance with directions of the arbitrators. If distribution of insurance proceeds by arbitration is required, the arbitrators will direct such distribution.

11.5 PERFORMANCE BOND AND PAYMENT BOND

11.5.1 The Owner shall have the right to require the Contractor to furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder as stipulated in bidding requirements or specifically required in the Contract Documents on the date of execution of the Contract.

11.5.2 Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall permit a copy to be made.

ARTICLE 12 UNCOVERING AND CORRECTION OF WORK

12.1 UNCOVERING OF WORK

12.1.1 If a portion of the Work is covered contrary to the Architect's request or to requirements specifically expressed in the Contract Documents, it must, if required in writing by the Architect, be uncovered for the Architect's examination and be replaced at the Contractor's expense without change in the Contract Time.

12.1.2 If a portion of the Work has been covered which the Architect has not specifically requested to examine prior to its being covered, the Architect may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be at the Owner's expense. If such work is not in accordance with the Contract Documents, correction shall be at the Contractor's expense unless the condition was caused by the Owner or a separate contractor in which event the Owner shall be responsible for payment of such costs.



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13.5.3 If such procedures for testing, inspection or approval under Subparagraphs 13.5.1 and 13.5.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure including those of repeated procedures and compensation for the Architect's services and expenses shall be at the Contractor's expense.

13.5.4 Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Architect.

13.5.5 If the Architect is to observe tests, inspections or approvals required by the Contract Documents, the Architect will do so promptly and, where practicable, at the normal place of testing.

13.5.6 Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

13.6 INTEREST

13.6.1 Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

13.7 COMMENCEMENT OF STATUTORY LIMITATION PERIOD

13.7.1 As between the Owner and Contractor:

1. Before Substantial Completion. As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion;
2. Between Substantial Completion and Final Certificate for Payment. As to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certificate for Payment; and
3. After Final Certificate for Payment. As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to act by the Contractor pursuant to any Warranty provided under Paragraph 3.5, the date of any correction of the Work or failure to correct the Work by the Contractor under Paragraph 12.2, or the date of actual commission of any other act or failure to perform any duty or obligation by the Contractor or Owner, whichever occurs last.



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ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

14.1 TERMINATION BY THE CONTRACTOR

14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, for any of the following reasons:

1. issuance of an order of a court or other public authority having jurisdiction which requires all Work to be stopped;
2. an act of government, such as a declaration of national emergency which requires all Work to be stopped;

- 3 because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Subparagraph 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or
- 4 the Owner has failed to furnish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Subparagraph 2.2.1.

14.1.2 The Contractor may terminate the Contract if, through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, repeated suspensions, delays or interruptions of the entire Work by the Owner as described in Paragraph 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

14.1.3 If one of the reasons described in Subparagraph 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

14.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has persistently failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Subparagraph 14.1.3.

14.2 TERMINATION BY THE OWNER FOR CAUSE

14.2.1 The Owner may terminate the Contract if the Contractor:

- 1 persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- 2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
- 3 persistently disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction; or
- 4 otherwise is guilty of substantial breach of a provision of the Contract Documents.

14.2.2 When any of the above reasons exist, the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

- 1 take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
- 2 accept assignment of subcontracts pursuant to Paragraph 5.4; and
- 3 finish the Work by whatever reasonable method the Owner may deem expedient. Upon request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

14.2.3 When the Owner terminates the Contract for one of the reasons stated in Subparagraph 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.



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1735 New York Avenue, N.W.
Washington, D.C. 20006-5292

14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Architect, upon application, and this obligation for payment shall survive termination of the Contract.

14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE

14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Subparagraph 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent:

- .1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or
- .2 that an equitable adjustment is made or denied under another provision of the Contract.

14.4 TERMINATION BY THE OWNER FOR CONVENIENCE

14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

14.4.2 Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall:

- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

14.4.3 In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.



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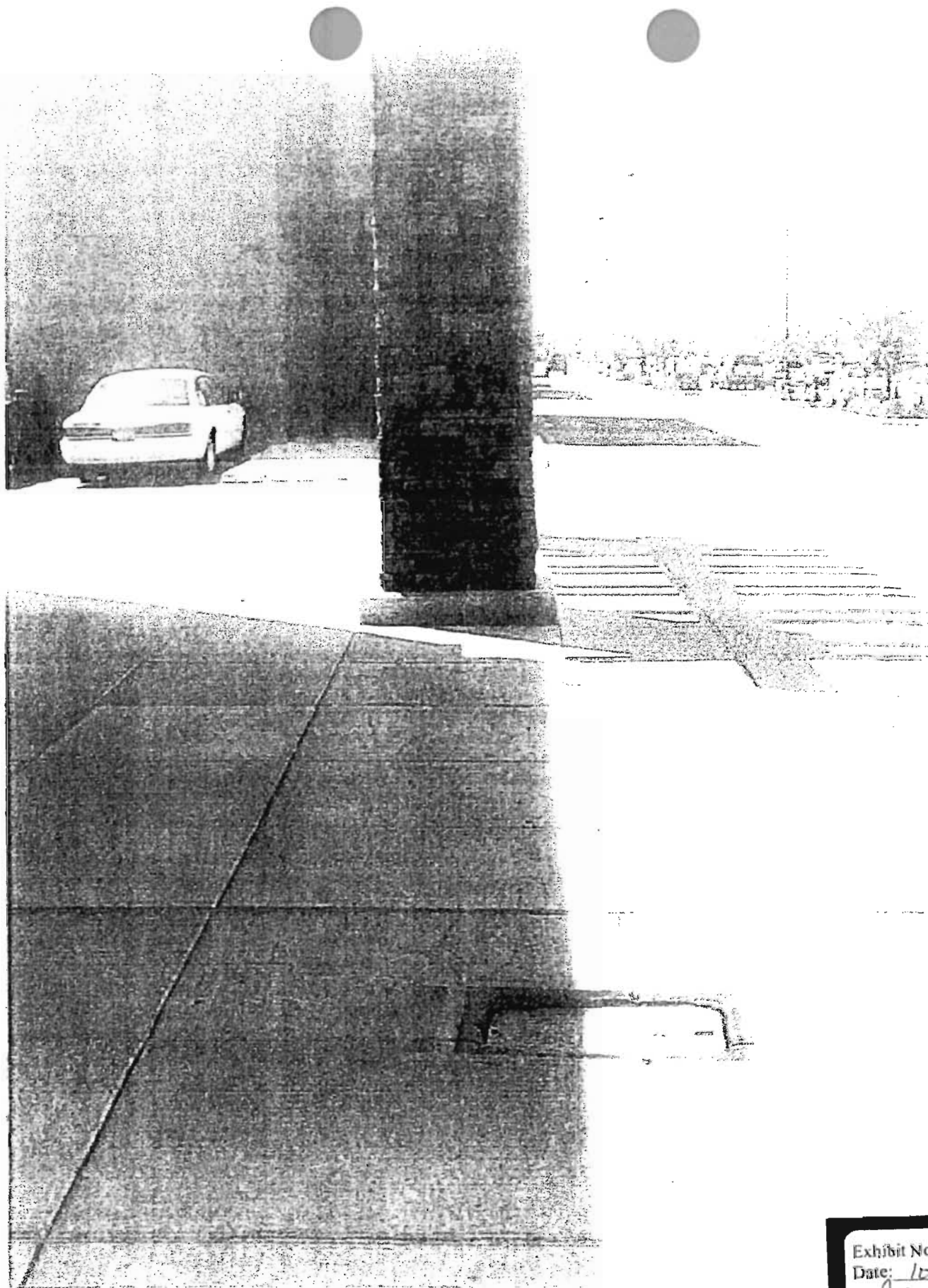


Exhibit No. 3
Date: 10-16-09
Arrington
T&T REPORTING

Exhibit No. 4
Date: 10/6/07
Aviation
T&T REPORTING

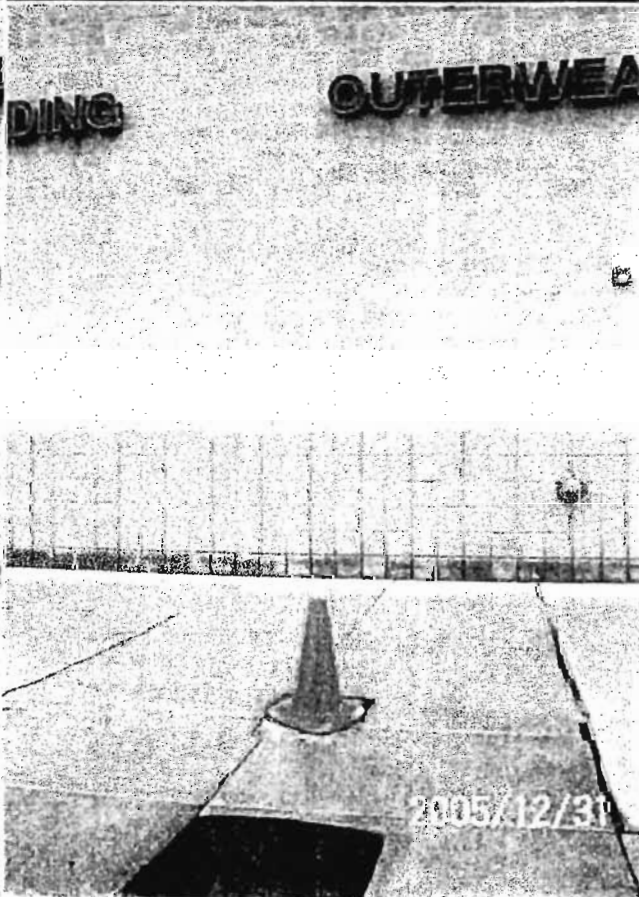
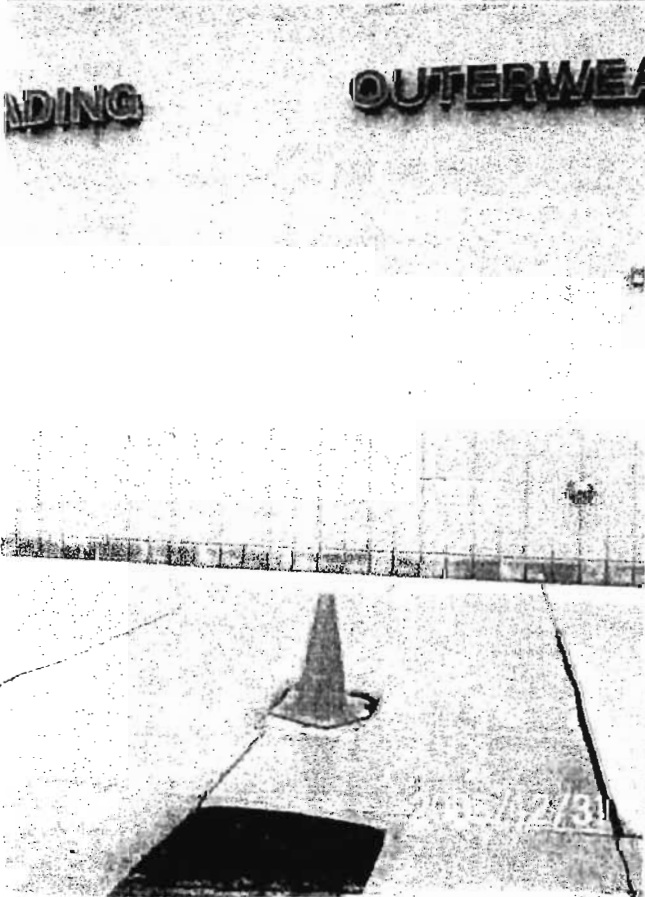
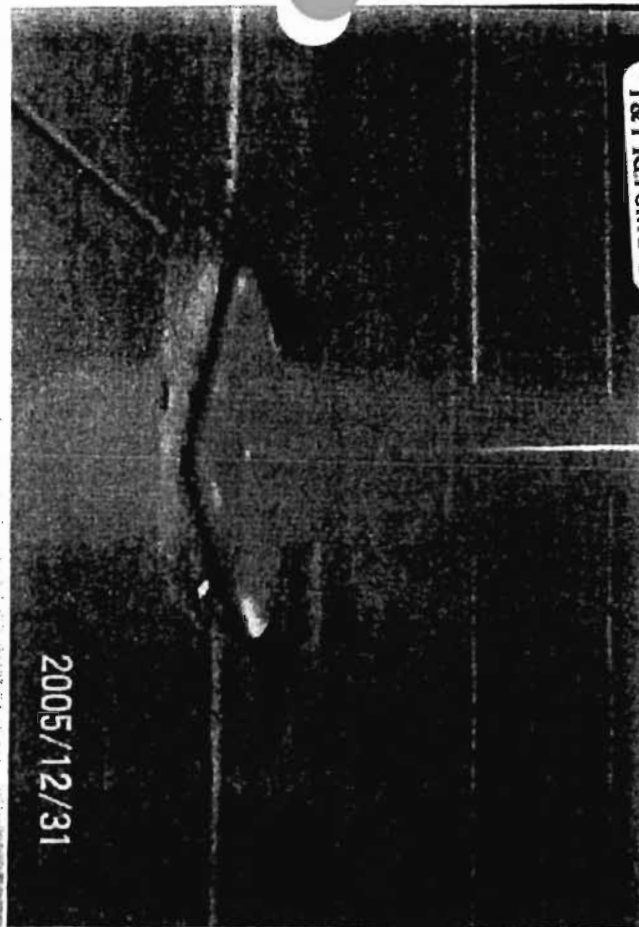
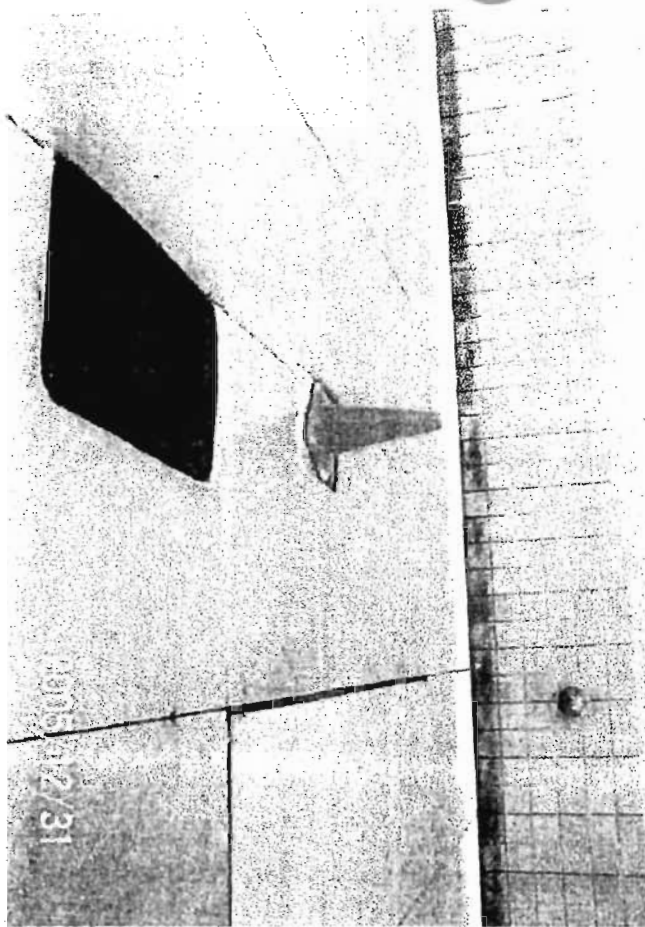
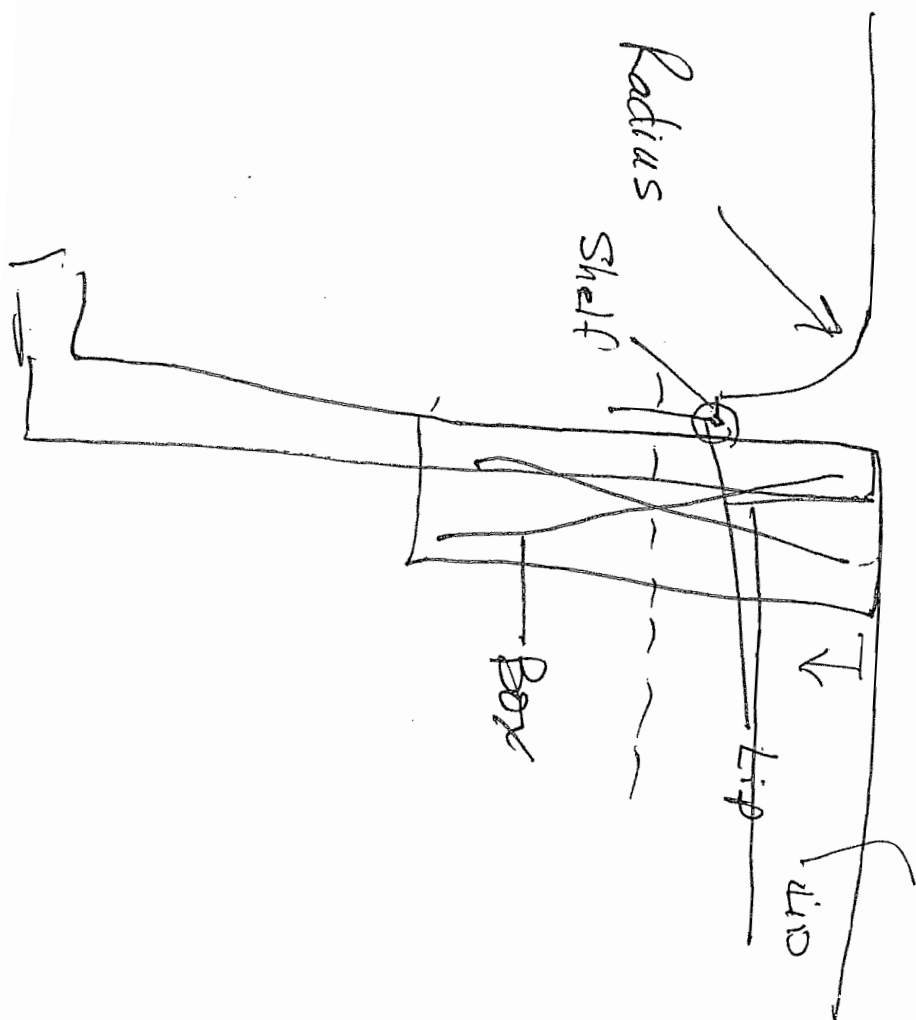
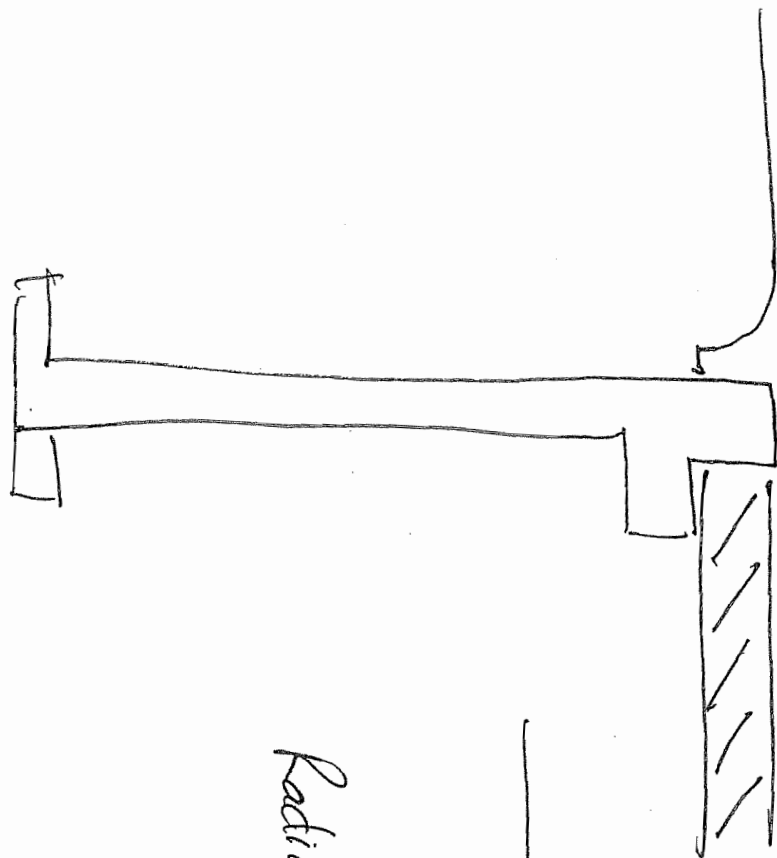




Exhibit No. 5
Date: 10/16/09
Amington
T&T REPORTING



AIA DOCUMENT B141-1997

(Modified by GA Architects, L.C. - January 1, 2001)

*Standard Form of Agreement Between Owner and Architect
with Standard Form of Architect's Services*

AGREEMENT made as of the:

Fifteenth day of April in the year Two Thousand and Three
(04/15/03)

FOR the purpose of this agreement, the owner is:

ENTERPRISE INVESTMENTS
P. O. Box 10
Star Prairie, WI 54028

(A tenant of the proposed structure)

and the Architect:

GA ARCHITECTS, L. C.
3032 South 1030 West, Suite 201
Salt Lake City, Utah 84119

This document has important
legal consequences.
Consultation with an
attorney is encouraged
with respect to its
completion or modification.

TABLE OF ARTICLES

1.1 INITIAL INFORMATION
1.2 RESPONSIBILITIES OF THE PARTIES
1.3 TERMS AND CONDITIONS
1.4 SCOPE OF SERVICES AND OTHER SPECIAL TERMS AND CONDITIONS
1.5 COMPENSATION

For the following Project:

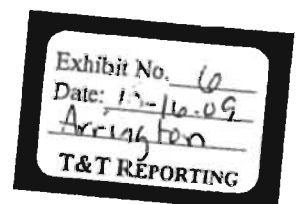
SPORTSMAN'S WAREHOUSE - Twin Falls, ID

Proposed 49,936 square foot concrete masonry unit shell located at 1940 Bridgeview Blvd. in Twin Falls, ID.
(GA Architects Project No. 03002)

The Owner and Architect agree as follows.

SUMMARY OF SERVICES:

- * Complete Civil Engineering design and construction documentation.
- * Complete Architectural design and construction documentation.
- * Complete Structural design and construction documentation.
- * Complete Electrical design and construction documentation.
- * Fire Protection design and specifications (Criteria only).
- * Landscape and irrigation design and specifications.
- * Site visits throughout construction process up to issuance of a Certificate of Occupancy by the City.
- * Twin Falls City review process through building permit.
- * Coordination and review efforts with other design and engineering consultants, contractor, owner and owners agents.
- * Assist owner to obtain contracts and permits for required work.
- * Printing allowance.
- * Shop Drawing Review.
- * As-Built drawings.
- * Site Plan approval process through the city Planning and Zoning and City Council.
- * Reimbursable Allowance.
- * Onsite Structural Inspection



Neither the Scope of Work nor the fee includes the following items:

1. Geotechnical engineering and soils reports.
2. Complete Mechanical design and construction documentation
3. Complete Plumbing design and construction documentation
4. Offsite traffic engineering and associated improvement design, which may be required by the city.
5. Additional reimbursable expenses in excess of allowance.
6. ALTA survey including topography, utilities and site features.
7. Special Inspections.
8. Tenant Improvements.

ARTICLE 1.1 INITIAL INFORMATION

1.1.1 This Agreement is based on the following information and assumptions.

1.1.2 PROJECT PARAMETERS

1.1.2.1 The Scope of Work for this Agreement is,

Construction documentation and administration for the proposed 49,936 square foot concrete masonry unit shell located at 1940 Bridgeview Blvd. in Twin Falls, ID. The proposed structure will be of concrete masonry unit construction with steel joist and steel frame with limited amounts of E.I.F.S., glass storefront at the entry, which will conform to Twin Falls City standards. The building will be fully sprinkled. The roof shall be a single membrane over rigid insulation. Heating and cooling will be accomplished using rooftop A/C units in a design build with CCI Mechanical, with a unit heater in the receiving pod for heat with a raised parapet to conceal them from visibility as required by the City of Twin Falls. Electrical will include service to the building, a main panel, warehouse style lighting and site lighting (as required by code and the Owner). The site is an Owner furnished pad situated in the existing Canyon Park East Center. The site will be standard duty asphalt paving with heavy duty paving in the truck circulation areas and concrete slab on grade in the loading docks. Site detention will be designed by the developer. We have assumed that all utilities are available.

1.1.2.2 The physical parameters are:

This proposal is based on the following approximate parameters: single 49,936 square foot concrete masonry unit shell situated on an Owner furnished pad located in the existing Canyon Park East Center.

1.1.2.3 The Owner's Program is:

As defined by Owner and GA Architects. The Owner shall agree to and sign-off on all floor plans and elevations prior to the commencement of construction documents.

1.1.2.4 The legal parameters are:

The Site as defined by the land survey and the topographic survey information provided by EHM Engineers, Inc.

1.1.2.5 The financial parameters are as follows.

Amount of the Owner's overall budget for the Project, including the Architect's compensation, is estimated at \$2,399,246.00.

1.1.2.6 The time parameters are:

Upon execution of this agreement, the Architect shall provide a proposed schedule to complete drawings and obtain permit, subject to the Owners and the City's approval process.

1.1.2.7 The proposed procurement or delivery method for the Project is:

Modified Design/Build-Bid

1.1.2.8 Other parameters are:

N/A

1.1.3 PROJECT TEAM

1.1.3.1 The Owner's Designated Representative is:

Stu Utgaard
P. O. Box 10
Star Prairie, WI 54028

1.1.3.2 The persons or entities, in addition to the Owner's Designated Representative, who are required to review the Architect's submittals to the Owner are:

N/A

1.1.3.3 The Owner's other consultants and contractors are:

General Contractor: Eckman & Mitchell Construction, L.C.
3032 South 1030 West, Suite 101
South Salt Lake, Utah 84119

1.1.3.4 The Architect's Designated Representative is:

Glenn W. Anderson, AIA
3032 South 1030 West, Suite 201
South Salt Lake, Utah 84119

1.1.3.5 The consultants retained at the Architect's expense are ("Architect's Consultants"):

Structural Engineer: Dunn Associates, Inc
380 West 800 South
Salt Lake City, UT 84101

Electrical Engineer: BNA Consulting Engineers
635 South State Street
Salt Lake City, UT 84111

1.1.4 Other important information is:

N/A

1.1.5 When the services under this Agreement include contract administration services, the General Conditions of the Contract for Construction shall be the edition of AIA Document A201 current as of the date of this Agreement which is expressly incorporated herein by reference, or as follows:

1.1.6 The information contained in this Article 1.1 may be reasonably relied upon by the Owner and Architect in determining the Architect's compensation. Both parties, however, recognize that such information may change and, in that event, the Owner and the Architect shall negotiate appropriate adjustments in schedule, compensation and Change in Services in accordance with Paragraph 1.3.3.

ARTICLE 1.2 RESPONSIBILITIES OF THE PARTIES

1.2.1 The Owner and the Architect shall cooperate with one another to fulfill their respective obligations under this Agreement. Both parties shall endeavor to maintain good working relationships among all members of the Project team.

1.2.2 OWNER

1.2.2.1 Unless otherwise provided under this Agreement, the Owner shall provide information in a timely manner regarding requirements for and limitations on the Project. The Owner shall furnish to the Architect, within 15 days after any event, which may give rise to lien rights on behalf of the Architect or the Architect's consultants, information necessary or relevant for the Architect to evaluate, give notice of or enforce its lien rights.

1.2.2.2 The Owner shall periodically update the budget for the Project, including that portion allocated for the Cost of the Work and the Cost of the Work under this Agreement. The Owner shall not significantly increase or decrease the overall budget, the portion of the budget allocated for the Cost of the Work under this Agreement or otherwise, or contingencies included in the overall budget, without the prior written agreement of the Architect to a corresponding change in the Project scope and quality.

1.2.2.3 The Owner's Designated Representative identified in Paragraph 1.1.3 shall be authorized to act on the Owner's behalf with respect to the Project and the Architect shall be entitled to rely upon the representations and decisions of the Owner's Designated Representative. The Owner or the Owner's Designated Representative shall render decisions in a timely manner pertaining to documents submitted by the Architect to avoid unreasonable delay in the orderly and sequential progress of the Architect's services.

1.2.2.4 The Owner shall furnish and pay for the services of all consultants required to complete the Project other than those designated in Paragraph 1.1.3 or authorize the Architect to furnish them as a Change in Services when such services are requested by the Architect and are reasonably required by the scope of the Project.

1.2.2.5 Unless otherwise provided in this Agreement, the Owner shall furnish and pay for all tests, inspections and reports required by law or the Contract Documents, such as structural, mechanical, and chemical tests, tests for air and water pollution, and tests for hazardous materials.

1.2.2.6 The Owner shall furnish and pay for all legal, insurance and accounting services, including auditing services that may be reasonably necessary at any time for the Project to meet the Owner's needs and interests.

1.2.2.7 The Owner shall provide prompt written notice to the Architect if the Owner becomes aware of any fault or defect in the Project, including any errors, omissions or inconsistencies in the Architect's Instruments of Service.

1.2.3 ARCHITECT

1.2.3.1 The services performed by the Architect, Architect's employees and Architect's consultants shall be as enumerated in Article 1.4.

1.2.3.2 The Architect's services shall be performed as expeditiously as is consistent with professional skill and care and in orderly progress of the Project. The Architect shall submit for the Owner's approval a schedule for the performance of the Architect's services which initially shall be consistent with the time periods established in Subparagraph 1.1.2.6 and which shall be adjusted, if necessary, as the Project proceeds. This schedule shall include allowances for periods of time required for the Owner's review, for the performance of the Owner's consultants, and for approval of submissions by authorities having jurisdiction over the Project. Time limits established by the schedule approved by the Owner shall not, except for reasonable cause, be exceeded by the Architect or Owner.

1.2.3.3 The Architect's Designated Representative identified in Paragraph 1.1.3 shall be authorized to act on the Architect's behalf with respect to the Project.

1.2.3.4 The Architect shall maintain the confidentiality of information specifically designated as confidential by the Owner, unless withholding such information would violate the law, create the risk of significant harm to the public or prevent the Architect from establishing a claim or defense in an adjudicatory proceeding. The Architect shall require of the Architect's consultants similar agreements to maintain the confidentiality of information specifically designated as confidential by the Owner.

1.2.3.5 Except with the Owner's knowledge and consent, the Architect shall not engage in any activity, or accept any employment, interest or contribution that would reasonably appear to compromise the Architect's professional judgment with respect to this Project.

1.2.3.6 The Architect shall take usual and customary care to review laws, codes, and regulations applicable to the Architect's services. The Architect shall respond in the design of the Project to requirements imposed by governmental authorities having jurisdiction over the Project.

1.2.3.7 The Architect shall be entitled to rely on the accuracy and completeness of services and information furnished by the Owner. The Architect shall provide written notice to the Owner if the Architect becomes actually aware (without a duty to investigate) of any errors, omissions or inconsistencies in such services or information.

ARTICLE 1.3 TERMS AND CONDITIONS

1.3.1 COST OF THE WORK

1.3.1.1 The Cost of the Work shall be total cost or, to the extent the Project is not completed, the estimated cost to the Owner of all elements of the Project designed or specified by the Architect.

1.3.1.2 The Cost of the Work shall include the cost at current market rates of labor and materials furnished by the Owner and equipment designed, specified, selected or specially provided for by the Architect, including the costs of management or supervision of construction or installation provided by a separate construction manager or contractor, plus a reasonable allowance for their overhead and profit. In addition, a reasonable allowance for contingencies shall be included for market conditions at the time of bidding and for changes in the Work.

1.3.1.3 The Cost of the Work does not include the compensation of the Architect and the Architect's consultants, the costs of the land, rights-of-way and financing or other costs that are the responsibility of the Owner.

1.3.2 INSTRUMENTS OF SERVICE

1.3.2.1 Drawings, specifications and other documents, including those in electronic form, prepared by the Architect and the Architect's consultants are Instruments of Service for use solely with respect to this Project. The Architect and/or the Architect's consultants shall be deemed the authors and the owners of their respective Instruments of Service and shall retain all common law, statutory and other reserved rights, including copyrights.

1.3.2.2 Upon execution of this Agreement, the Architect grants to the Owner a nonexclusive license to reproduce the Architect's Instruments of Service solely for the purposes of constructing, using and maintaining the Project, provided that the Owner shall comply with all obligations, including prompt payment of all sums when due, under this Agreement. The Architect shall obtain similar nonexclusive licenses from the Architect's consultants consistent with this Agreement. Any termination of this Agreement prior to completion of the Project shall terminate this license. Upon such termination, the Owner shall refrain from making further reproductions of Instruments of Service and shall return to the Architect within seven days of termination all originals and reproductions of the Instruments of Service in the Owner's possession or control. If and upon the date the Architect is adjudged in default of this Agreement, the foregoing license shall be deemed terminated and replaced by a second, nonexclusive license permitting the Owner to authorize other similarly credentialed design professionals to reproduce and, where permitted by law, to make changes, corrections or additions to the Instruments of Service solely for purposes of completing, using and maintaining the Project, provided Architect is fully compensated for its services rendered to the date of termination under this Agreement. The retention or use of the Instruments of Service after the termination of this Agreement shall constitute the Owner's, or its successor's consent to the provisions of this paragraph.

1.3.2.3 Except for the licenses granted in Subparagraph 1.3.2.2, no other license or right shall be deemed granted or implied under this Agreement. The Owner shall not assign, delegate, sublicense, pledge or otherwise transfer any license granted herein to another party without the prior written agreement of the Architect. However, the Owner shall be permitted to authorize the Contractor, Subcontractor, Sub-subcontractors and material or equipment suppliers to reproduce applicable portions of the Instruments of Service appropriate to and for in their execution of the Work by the license granted in Subparagraph 1.3.2.2. Submission or distribution of Instruments of Service to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publications in derogation of the reserved rights of the Architect and the Architect's Consultants. The Owner shall not use the Instruments of Service for future additions, or alterations to the Project, or for other projects, unless the Owner obtains the prior written agreement of the Architect and the Architect's Consultants. Any unauthorized use of the Instruments of Service shall be at the Owner's sole risk and without liability to the Architect and the Architect's Consultants.

1.3.2.4 Prior to the Architect providing to the Owner any Instruments of Service in electronic form or the Owner providing to the Architect any electronic data for incorporation into the Instruments of Service, the Owner and the Architect shall by separate written agreement set forth the specific conditions governing the format of such Instruments of Service or electronic data, including any special limitations or licenses not otherwise provided in this Agreement.

1.3.3 CHANGE IN SERVICES

1.3.3.1 Change in Services of the Architect, including services required of the Architect's Consultant's, may be accomplished after execution of this Agreement, without invalidating the Agreement, if mutually agreed in writing. If required by circumstances beyond the Architect's control, or if the Architect's services are affected as described in Subparagraph 1.3.3.2. In the absence of mutual agreement in writing, the Architect shall notify the Owner prior to providing such services. If the Owner deems that all or part of such Change in Services is not required, the Owner shall give prompt written notice to the Architect, and the Architect shall have no obligations to provide those services and Owner shall assume all risks and liability associated with the failure to perform such Work. Except for a change due to fault of the Architect, Change in Services of the Architect shall entitle the Architect to an adjustment in compensation pursuant to Paragraph 1.5.2, and to any Reimbursable Expenses described in Subparagraph 1.3.9.2 and Paragraph 1.5.5.

1.3.3.2 If any of the following circumstances affect the Architect's services for the Project, the Architect shall be entitled to an appropriate adjustment in the Architect's schedule and compensation:

1. changes in the instructions or approvals given by the Owner that necessitate revisions in Instruments of Service, additional testing, reports or surveys, etc.,
2. enactment or revision of codes, laws or regulations or official interpretations which necessitate changes to previously prepared Instruments of Service;
3. decisions of the Owner not rendered in a timely manner;
4. change in the Project including, but not limited to, size, quality, complexity, the Owner's schedule or budget, or procurement method;
5. failure of performance on the part of the Owner or the Owner's consultants, including, but not limited to, those contained in Subparagraph 1.1.3.3;
6. preparation for and attendance at a public hearing, a dispute resolution proceeding or a legal proceeding except where the Architect is party thereto;
7. change in the information contained in Article 1.

1.3.4 MEDIATION

1.3.4.1 Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party. If such matter relates to or is the subject of a lien arising out of the Architect's services, the Architect may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the matter by mediation or by arbitration.

1.3.4.2 The Owner and Architect shall endeavor to resolve claims, disputes and other matters in question between them by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

1.3.4.3 The parties shall split the mediator's fee and any filing fees equally. The mediation shall be held in the City where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

1.3.5 ARBITRATION

1.3.5.1 Any claim, dispute or other matter in question arising out of or related to this Agreement may be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with Paragraph 1.3.4.

1.3.5.2 Claims, disputes and other matters in question between the parties that are not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other Party to this Agreement and with the American Arbitration Association.

1.3.5.3 A demand for arbitration shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

1.3.5.4 No arbitration arising out of or relating to this Agreement shall include, by consolidation or joinder or in any other manner, an additional person or entity not a party to this Agreement, except by written consent containing a specific reference to this Agreement and signed by the Owner, Architect and any other person or entity sought to be joined. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim dispute or other matter in question not described in the written consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to this Agreement shall be specifically enforceable with applicable law in any court having jurisdiction thereof.

1.3.5.5 The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

1.3.6 CLAIMS FOR CONSEQUENTIAL DAMAGES

The Architect and the Owner waive consequential damages for claims, disputes, or other matters in question arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Paragraph 1.3.8.

1.3.7 MISCELLANEOUS PROVISIONS

1.3.7.1 This Agreement shall be governed by the law of the principal place of business of the Architect, unless otherwise provided in Paragraph 1.4.2.

1.3.7.2 Terms in this Agreement shall have the same meaning as those in the edition of AIA Document A201, General Conditions of the Contract for Construction, current as of the date of this Agreement which is incorporated herein by reference.

1.3.7.3 Causes of action between the parties to this Agreement pertaining to acts or failure to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion or the date of issuance of the final Certificate for Payment for acts or failure to act occurring after Substantial Completion. In no event shall such statutes of limitations commence to run any later than the date when the Architect's services are substantially completed.

1.3.7.4 To the extent damages are covered by property insurance during construction, the Owner and the Architect waive all rights against each other and against the contractors, consultants, agents and employees of the other for damages, except such rights as they may have to the proceeds of such insurance as set forth in the edition of AIA Document A202, General Conditions of the Contract for Construction, current as of the date of this Agreement. The Owner or the Architect, as appropriate, shall require of the contractors, consultants, agents and employees of any of them similar waivers in favor of the other parties enumerated herein.

1.3.7.5 Nothing contained in this Agreement shall create a contractual relationship with or cause of action in favor of a third party against either the Owner or Architect.

1.3.7.6 Unless otherwise provided in this Agreement, the Architect and Architect's consultants shall have no responsibility for the discovery, presence, handling, removal or disposal of, or exposure of persons to hazardous materials or toxic substances in any form at the Project site.

1.3.7.7 The Architect shall have the right to include photographic or artistic representations of the design of the Project among the Architect's promotional and professional materials. The Architect shall be given reasonable access to the completed Project to make such representations. However, the Architect's materials shall not include the Owner's confidential or proprietary information if the Owner has previously advised the Architect in writing of the specific information considered by the Owner to be confidential or proprietary. The Owner may provide professional credit for the Architect in the Owner's promotional materials for the Project.

1.3.7.8 If the Owner requests the Architect to execute certificates, the proposed language of such certificates shall be submitted to the Architect for review at least 14 days prior to the requested dates of execution. The Architect shall not be required to execute certificates that are false or misleading or would require knowledge, services or responsibilities beyond the scope of this Agreement and the Architect's duties herein.

1.3.7.9 The Owner and Architect, respectively, bind themselves, their successors and assigns to the other party to this Agreement and to their successors and assigns and legal representatives of such other party with respect to all covenants of this Agreement. Neither the Owner nor the Architect shall assign this Agreement without the written consent of the other, except that the Owner may assign this Agreement to an institutional lender providing financing for the Project. In such event, the lender shall assume the Owner's rights and obligations under this Agreement. The Architect shall execute all consents reasonably required to facilitate such assignment.

1.3.8 TERMINATION OR SUSPENSION

1.3.8.1 If the Owner fails to make payments to the Architect in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for termination or, at the Architect's option, cause for suspension of performance of services under this Agreement. If the Architect elects to suspend services, prior to suspension of services, the Architect shall give seven (7) days written notice to the Owner. In the event of a suspension of services, the Architect shall have no liability to the Owner for delay or damage caused the Owner because of such suspension of services. Before resuming services, the Architect and the Architect's Consultants shall be paid all sums due prior to suspension and any expenses incurred in the interruption and resumption of the Architect's services. The Architect's fees for the remaining services and the time schedules shall be equitably adjusted.

1.3.8.2 If the Project is suspended by the Owner for more than 30 consecutive days, the Architect shall be immediately compensated for services performed prior to notice of such suspension. When the Project is resumed, the Architect shall be compensated for expenses incurred in the interruption and resumption of the Architect's services. The Architect's fees for the remaining services and the time schedules shall be equitably adjusted.

1.3.8.3 If the Project is suspended or the Architect's services are suspended for more than 30 consecutive days, the Architect may terminate this Agreement by giving not less than seven (7) days written notice.

1.3.8.4 This Agreement may be terminated by either party upon not less than seven (7) days written notice if the defaulting party fails to perform in accordance with the terms of this Agreement through no fault of the non-defaulting party.

1.3.8.5 This Agreement may be terminated by the Owner upon less than seven (7) days written notice to the Architect for the Owner's convenience and without cause.

1.3.8.6 In the event of termination, the Architect shall be compensated for services performed prior to termination, together with Reimbursable Expenses then due and all Termination Expenses as defined in Subparagraph 1.3.8.7.

1.3.8.7 Termination Expenses are in addition to compensation for the services of the Agreement and include expenses directly attributable to termination for which the Architect is not otherwise compensated, plus an amount for the Architect's anticipated profit on the value of the services not performed by the Architect.

1.3.9 PAYMENTS TO THE ARCHITECT

1.3.9.1 Payments on account of services rendered and for Reimbursable Expenses incurred shall be made monthly upon presentation of the Architect's statement of services. No deductions shall be made from the Architect's compensation on account of penalty, liquidated damages or other sums withheld from payments to contractors, or on account of the cost of changes in the Work other than those for which the Architect has been adjudged to be liable.

1.3.9.2 Reimbursable Expenses are in addition to compensation for the Architect's services and include expenses incurred by the Architect and Architect's employees and Architect's Consultants directly related to the Project, as identified in the following clauses:

- .1 transportation in connection with the Project, authorized out-of-town travel and subsistence, and electronic communications;
- .2 fees paid for securing approval of authorities having jurisdiction over the Project;
- .3 reproductions, plots, standard form documents, postage, handling and delivery of Instruments of Service;
- .4 expenses of overtime work requiring higher than regular rates if authorized in advance by the Owner;
- .5 renderings, models and mock-ups requested by the Owner;
- .6 expense of professional liability insurance dedicated exclusively to this Project or the expense of additional insurance coverage or limits requested by the Owner in excess of that normally carried by the Architect and the Architect's Consultants;

- .7 reimbursable expenses as designated in Paragraph 1.5.5;
- .8 other similar direct Project-related expenditures.

1.3.9.3 Records of Reimbursable Expenses, of expenses pertaining to a Change in Services, and of services performing on the basis of hourly rates or a multiple of Direct Personnel Expense shall be available to the Owner or the Owner's authorized representative at mutually convenient times.

1.3.9.4 Direct Personnel Expense is defined as the direct salaries of the Architect's and Architect's Consultant's personnel engaged on the Project and the portion of the cost of their mandatory and Customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, employee retirement plans and similar contributions.

ARTICLE 1.4 SCOPE OF SERVICES AND OTHER SPECIAL TERMS AND CONDITIONS

1.4.1 Enumeration of parts of the Agreement. This Agreement represents the entire and integrated agreement between the Owner and the Architect and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Architect. This Agreement comprises the documents listed below:

1.4.1.1 The Agreement Between Owner and Architect, AIA Document B141-1997, as modified.

1.4.1.2 Other documents as follows: The AIA-201 1997 Agreement (by reference).

1.4.2 SPECIAL TERMS & CONDITIONS THAT MODIFY THIS AGREEMENT ARE AS FOLLOWS:

1.4.2.1 Owner and the Architect shall indemnify each other and hold each other harmless, and also their respective contractors, subcontractors and sub-subcontractors, consultants, agents and employees, each of the other, from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work or of professional services under this Agreement. The indemnification obligations under this Subparagraph 12.2.1 shall not be limited with respect to amount or type of damages, compensation or benefits required to be paid by or for the Architect or Owner or a subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts. Such obligation shall not be construed to negate, abridge or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 12.2.

1.4.2.2 The indemnification obligations hereunder shall be limited to claims, damages, losses and expenses that are (1) attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), including loss of use resulting therefrom, and (2) caused in whole or in part by negligent acts or omissions of the Architect or the Owner, anyone directly or indirectly employed by either, or anyone for whose acts either may be liable.

1.4.2.3 The indemnification obligations hereunder shall be further limited to the extent of responsibility for the claims, damages, losses and expenses on a comparative basis of fault and responsibility between the Architect and the Owner, and between others obligated to indemnify or to be indemnified hereunder. "Comparative basis of fault and responsibility" shall be determined on the basis of existing facts independently of any statutory or judicial definition, which might otherwise be deemed to be applicable.

1.4.2.4 To the fullest extent permitted by law, and notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of the Design Professional and the Design Professional's officers, directors, partners, members, employees, agents and subconsultants, and any of them, to the Client and anyone claiming by, through or under the Client, for any and all claims, losses, costs or damages of any nature whatsoever arising out of, resulting from or in any way related to the Project or the Agreement from any cause or causes, including but not limited to the negligence, professional errors or omissions, strict liability, breach of contract or warranty, express or implied, of the Design Professional or the Design Professional's officers, directors, members, employees, agents or subconsultants, or any of them, shall not exceed the total compensation received by the design Professional under this Agreement, to the total amount the Design Professional's insurance, whichever is greater. It is intended that this limitation apply to any and all liability or cause of action however alleged or arising, unless otherwise prohibited by law.

ARTICLE 1.5 COMPENSATION

1.5.1 For the Architect's services as described under Article 1.4, compensation shall be computed as follows:

Survey	\$	N/A
Asbestos Report	\$	N/A
Geotechnical	\$	N/A
Civil	\$	N/A
Architectural	\$	23,500.00
Structural	\$	8,000.00
Mechanical	\$	N/A
Plumbing	\$	N/A
Electrical	\$	5,500.00
Fire Protection Specification	\$	500.00
Landscaping	\$	N/A
Data and Phone Cabling	\$	N/A
Paging System	\$	N/A
City Coordination	\$	3,500.00
Planning and Zoning Review	\$	N/A
Construction Period	\$	5,000.00
As-Built Drawings	\$	1,500.00
Reimbursable Allowance	\$	13,000.00
TOTAL	\$	60,500.00

1.5.2 If the services of the Architect are changed as described in Subparagraph 1.3.3, the Architect's compensation shall be adjusted. Such adjustment shall be calculated as described below or, if no method of adjustment is indicated in this Paragraph 1.5.2, in an equitable manner.

Any additional services as directed by the owner will be billed at the following rates unless a set fee is agreed to in writing by both parties for a specific scope of services:

DISCIPLINE: (in-house)

Principal Architect/per hour	\$85.00
Associate Architect/per hour	\$75.00
Project Architect/per hour	\$65.00
Production Manager/per hour	\$55.00
Production Assistant/per hour	\$45.00
Interior Designer/per hour	\$40.00
Clerical/per hour	\$25.00

1.5.3 For a Change in Services of the Architect's consultants, compensation shall be computed as a multiple of one hundred and ten per cent (1.10) times the amounts billed to the Architect for such services.

1.5.4 For Reimbursable Expenses as described in Subparagraph 1.3.9.2, and any other items included in Paragraph 1.5.5 as Reimbursable Expenses, the compensation shall be computed as a multiple of one hundred and ten per cent (1.10) times the expenses incurred by the Architect, and the Architect's employees and consultants.

1.5.5 Other Reimbursable Expenses, if any are as follows: N/A

1.5.6 The rates and multiples for services of the Architect and the Architect's consultants as set forth in the Agreement shall be adjusted in accordance with their normal salary review practices.

1.5.7 An initial payment of Zero Dollars (\$ 0.00) shall be made upon execution of this Agreement and is the minimum payment under this Agreement. It shall be credited to the Owner's account at final payment. Subsequent payments for services shall be made monthly, and where applicable, shall be in proportion to services performed on the basis set forth in this Agreement.

1.5.8 Payments are due and payable Thirty (30) days from the date of the Architect's invoice. Amounts unpaid Thirty (30) days after the invoice date shall bear interest at the rate entered below, or in the absence thereof as the legal rate prevailing from time to time at the principal place of business of the Architect.

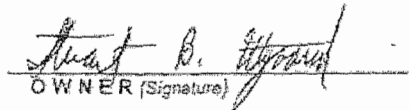
Eighteen percent per annum (18% per annum)

1.5.9 If the service covered by this Agreement have not been completed within Twelve (12) months of the date hereof, through no fault of the Architect, extension of the Architect's services beyond that time shall be compensated as provided in Paragraph 1.5.2.

This Agreement entered into as of the day and year first written above.


ARCHITECT (Signature)

Glenn W. Anderson, AIA
Principal Architect


OWNER (Signature)

STUART B. UTGAARD, CEO
(Printed name and title)



Reporters, Inc. 10 West 11th Street, Suite 100, New York, NY 10011
 (212) 512-1111 ext. 1000 FAX (212) 512-1112



EILEEN ANN McDEVITT, an individual,
 Plaintiff,
 v.
 CANYON PARK MANAGEMENT I, INC., an Idaho corporation, CANYON PARK, L.L.C, an Idaho Limited Liability company, CANYON PARK DEVELOPMENT, L.L.C., an Idaho Limited Liability Company, ECKMAN & MITCHELL CONSTRUCTION, L.L.C, a Utah Limited Liability Company, SPORTSMAN'S WAREHOUSE, INC., a Utah corporation, JOHN DOE and JANE DOE, husband and wife, I through X, and BUSINESS ENTITIES 1 through X,
 Defendants.

: CASE NO. CV 17-5749
 : DEPOSITION OF:
 : GLENN ANDERSON
 : TAKEN: AUGUST 19, 2009
 : REPORTED BY:
 : CARILEE DUSTIN, CSR, RPR

GLENN ANDERSON

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-ooOoo-

Deposition of GLENN ANDERSON, taken on behalf of the Plaintiff, at 10 West 100 South, Suite 250, Salt Lake City, Utah, before CARILEE DUSTIN, Certified Shorthand Reporter in and for the State of Utah, pursuant to Notice.

A P P E A R A N C E S

For the Plaintiff:

Jeffrey J. Hepworth
 JEFFREY J. HEPWORTH, P.A. & ASSOCIATES
 161 5th Avenue South, Suite 100
 Twin Falls, ID 83303-1806
 (208) 734-0702

For Defendant Canyon Park, LLC; Canyon Park Development, LLC; & Nellsen & Co., LLC:

Nicole Cannon
 TOLMAN & BRIZEE, P.C.
 132 3rd Avenue East
 Twin Falls, ID 83301
 (208) 733-5566

For Defendant Sportsman's Warehouse, Inc. :

Jeremy D. Brown
 QUANE SMITH
 2325 West Broadway, Suite B
 Idaho Falls, ID 83402-2948
 (208) 529-0000

For Defendant Eckman & Mitchell Construction, LLC:

Bradley J Williams
 MOFFATT THOMAS
 420 Memorial Drive
 Idaho Falls, ID 83405
 (208) 522-6700

-ooOoo-

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EXHIBITS

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4 called as a witness herein, having been first duly sworn
5 by the Certified Shorthand Reporter to tell the truth,
6 was examined and testified as follows:

7 EXAMINATION

8 BY MR. HEPWORTH:

9 Q. Let the record reflect that this is the
13:16 10 deposition of Glenn Anderson, taken pursuant to notice
11 in the Idaho Rules of Civil Procedure.

12 Mr. Anderson, have you ever had your
13 deposition taken before?

14 A. Yes.

13:16 15 Q. On how many occasions?

16 A. Three.

17 Q. Did any of those depositions involve work
18 on Sportsman's Warehouse buildings?

19 A. No.

13:16 20 Q. I'm just going to repeat some of the
21 warnings that you probably have already heard, just so
22 that the process goes a little bit more smoothly.

23 If there's a question that I ask that
24 doesn't make sense to you for whatever reason, I'm not
13:16 25 going to be offended if you tell me you don't

5

1 understand the question, and I'll try to make sense of
2 it. And sometimes I ramble and have multiple part
3 questions, and so I don't always ask good questions, so
4 just please tell me if it doesn't make sense and I'll
13:17 5 try to make it a little more concise.

6 Secondly, it's important that we talk one
7 at a time instead of at the same time. If we talk at
8 the same time, it's almost impossible to get an
9 accurate record of the conversation.

13:17 10 And thirdly, when you answer, if you could
11 answer with a yes or a no rather than a nod or a shake
12 of the head or an uh-huh or huh-uh, then we'll be able
13 to understand the transcript as well.

14 Could you just give me a thumbnail sketch
13:17 15 of your educational background.

16 A. University of Tennessee, bachelor of
17 architecture, licensed in -- I believe 1985. Practiced
18 architecture. Licensed in 35 states as an architect.

19 Q. In 35 states?

13:18 20 A. Thirty-five states.

21 Q. Wow.

22 A. Eight states as a general contractor. I'm

13:18 5 Where did you grow up?

6 MR. WILLIAMS: Objection, assumes facts not
7 in evidence.

8 MR. HEPWORTH: I hope you're friends.

9 MS. CANNON: Used to be.

13:18 10 THE WITNESS: I was born in Salt Lake; moved
11 to Illinois; lived in Iowa; moved to South America for
12 five years; moved to Tennessee, at which time I was
13 approximately 10. I was in Tennessee for five years;
14 moved to Vancouver, Washington; sophomore in high
13:19 15 school, moved back to Tennessee, where I graduated from
16 Merivolt (phonetic), attended college there.

17 My folks moved to upstate New York, so I
18 spent some time up there and then moved to Utah. I was
19 on my way to California, happened to get a job here, and
13:19 20 I've been here since.

21 Q. If I can ask, what did your father do?

22 A. He was with Alcoa. He was an industrial
23 engineer, mechanical engineer by trade, went down there
24 for construction of a dam to convert bauxite into
13:19 25 alumina. That's basically what it was. And then he

7

1 went into management with Alcoa.

2 Q. Very interesting.

3 A. Spent some time in Nicaragua. I left that
4 out.

13:19 5 Q. When did you graduate from the University
6 of Tennessee?

7 A. Fall of '77.

8 Q. And then I think you said you got licensed
9 in '85. What did you do between '77 and '85?

13:20 10 A. I worked with architectural firms in Salt
11 Lake. There was a requirement at that time to have at
12 least three years' experience before you could take the
13 exam.

14 Q. I see.

13:20 15 Okay. You've been licensed as an architect
16 in 35 states. How many of those states require an
17 examination?

18 A. Don't hold me to it, but I'm going to say
19 14.

13:20 20 Q. Okay. Is there a reason that you are
21 licensed in 35 states? Does it have something to do
22 with Sportsman's Warehouse?

4 later became Pace, and some of it was for miscellaneous
 13:21 5 projects, such as Arizona and Idaho. The rest was
 6 largely associated with Sportsman's Warehouse. I think
 7 I had five licenses when I started with Sportsman's.
 8 Q. How are you currently employed?
 9 A. Through GA Architects, which is a firm that
 13:21 10 I am part owner of.
 11 Q. GAR Architects?
 12 A. GA.
 13 Q. Okay. Sorry.
 14 A. Architects.
 13:21 15 Q. Who are the other owners?
 16 A. Gary Eckman has part interest, and myself.
 17 Q. And is it the Gary Eckman of Eckman
 18 Construction?
 19 A. It is.
 13:21 20 Q. And is he also an architect?
 21 A. No.
 22 Q. So is it a corporation or an LLC?
 23 A. LLC.
 24 Q. Is it a separate entity from Eckman
 13:22 25 Construction, then?

9

1 A. It is.
 2 Q. Do you work in the same building?
 3 A. Yes.
 4 Q. How long have you been associated with Gary
 13:22 5 Eckman?
 6 A. I've known him for 20 years. The
 7 association as GA Architects has been about 10.
 8 Actually, 25 years.
 9 Q. Did you ever work for Eckman Construction
 13:22 10 or any construction entity?
 11 A. No.
 12 Q. And these might seem like crazy questions,
 13 and I'm just largely curious, but I like to kind of
 14 know the background.
 13:22 15 It's my understanding that Sportsman's
 16 Warehouse is a Utah entity, got started in Utah. Is
 17 that true?
 18 A. Yes.
 19 Q. Do you know the owners of Sportsman's
 13:22 20 Warehouse?
 21 A. Yes.
 22 Q. How do you know them?

4 Q. It sounds like Sportsman's Warehouse is on
 13:23 5 on a growth boom at some point. Is that accurate?
 6 A. Yes.
 7 Q. What years was the growth boom?
 8 A. Growth started in '98. We did one store,
 9 and we thought we'd be lucky to see them do four in the
 13:23 10 State of Utah. And so after 75 stores now, and the
 11 warehouse, the distribution centers, the corporate
 12 office, I'm going to say the major growth probably
 13 started around 2005.
 14 Q. All right. Have you done work for any
 13:24 15 clients other than Sportsman's Warehouse since, say,
 16 1998?
 17 A. Yes.
 18 Q. What other clients did you have?
 19 A. Hunter Douglas, McGillis School.
 13:24 20 Q. Could you spell that?
 21 A. M-C capital G-I-L-L-I-S.
 22 Q. And it's a school?
 23 A. Yes. And that's the job site I just left.
 24 And we've been working with them since 1991.
 13:24 25 Q. Okay.

11

1 A. Ballard Medical, Kimberly Clark. Boy,
 2 there's so many of them, excuse me.
 3 Q. What percentage of your income would come
 4 from Sportsman's Warehouse in the past 10 years?
 13:25 5 A. Varied from year to year. The first five
 6 years, probably from 10 percent to 30 percent. Then
 7 through the growth years, it increased up to about 80
 8 percent. And that was probably in the last two to
 9 three years.
 13:25 10 Q. Do you serve in any capacity for
 11 Sportsman's Warehouse, like on its board or --
 12 A. No.
 13 Q. Never been an in-house employee of
 14 Sportsman's Warehouse?
 13:25 15 A. Other than I get an employee discount.
 16 Q. That's very nice.
 17 A. I'll show up on the computer that way.
 18 Q. Do you know the people who started
 19 Sportsman's Warehouse on a personal level?
 13:25 20 A. Now I do, yes. I would say it's personal.
 21 Q. And are they in Salt Lake?
 22 A. No. Well, one of them still is, I believe.

4 Q. Sandy.

13:26 5 A. Technically, Historic Landing.

6 Q. What percentage of your income in the last,

7 say, five years is working on Eckman Construction

8 projects, if you had to guess?

9 A. Hmm, probably around 80 percent. That may

13:26 10 be higher or lower, but approximately.

11 Q. Is that the case currently?

12 A. No. Currently, we are 50 percent or less

13 with Eckman.

14 Q. I represent Eileen McDevitt, who fell at

13:27 15 the Sportsman's Warehouse store in Twin Falls. You're

16 aware that there's litigation involving that fall,

17 obviously, now?

18 A. Yes.

19 Q. When did you first become aware of that

13:27 20 litigation?

21 A. I'm going to guess it was about a year ago.

22 Q. How did you become aware of it?

23 A. I was asked to produce any documents that

24 we had concerning the case, which typically means

13:27 25 there's litigation or something's going on. And that

13

1 was through Eckman's counsel, Eric Robinson.

2 Q. What documents did you produce, if you

3 recall?

4 A. I believe a set of drawings and a punch

13:28 5 list.

6 Q. Where is the punch list?

7 A. Where is it?

8 Q. Yes.

9 A. It's on file, and I believe there was a

13:28 10 copy furnished, and I have no clue as to where that

11 would be.

12 Q. You didn't bring a punch list today?

13 A. No, I did not.

14 MR. HEPWORTH: You prepared an affidavit,

13:28 15 and I'm going to have that marked as Exhibit 7.

16 (Exhibit 7 marked.)

17 Q. (BY MR. HEPWORTH) I'm handing you what's

18 been marked as Deposition Exhibit 7. Do you recognize

19 that affidavit?

13:28 20 A. Yes.

21 Q. And it looks like you signed that affidavit

22 on June 26, 2009; is that correct?

13:29 5 was still available, one of those items being a punch

6 list.

7 Q. Do you have an independent recollection of

8 the Twin Falls Sportsman's Warehouse project?

9 A. Yes.

13:29 10 Q. Do you have an independent recollection of

11 what we've been calling the irrigation boxes in the

12 front sidewalk of the Sportsman's Warehouse store?

13 A. Yes.

14 Q. What is your memory of how that all came

13:29 15 about?

16 MR. WILLIAMS: Object to the form. I'm just

17 making an objection for the record.

18 Q. (BY MR. HEPWORTH) You can go ahead.

19 Unless he tells you not to answer, then go ahead and

13:29 20 answer.

21 A. Just making sure everybody was done.

22 As I recall, the developer was required to

23 bring irrigation water to the front of the building.

24 That was for a planter that was supposed to have gone

13:30 25 in in the front. The developer didn't want that to be

15

1 installed. And part of that was for the water service

2 to the building, along with the meter box. If I'm

3 correct, one of those boxes was probably a meter box.

4 Those items were installed, but the

13:30 5 developer didn't want the irrigation box -- or the

6 planter installed, so it was left for future connection

7 should they ever change their mind.

8 Q. You're referring to the developer. You've

9 used that word, "developer."

13:30 10 A. Yes.

11 Q. Who are you referring to when you refer to

12 the word "developer"?

13 A. I can't say who that was at this point.

14 Whoever was the owner of the property and the owner of

13:30 15 the center.

16 Q. Was there a particular individual that you

17 dealt with that was representing the developer?

18 A. There was a person that we dealt with more

19 than not, and I'll say there were two. One was with

13:31 20 the developer and the other was the contractor for the

21 site.

22 Q. Do you remember the names of the people?

4 the records from that period of time were disposed of
13:31 5 by an employee of mine. He wasn't supposed to, but he
6 did.

7 Q. And I'll just represent to you that we've
8 taken two depositions already, Ray Patience and
9 Mr. Duke, who's with Eckman.

13:31 10 A. Scott.

11 Q. Scott. Do you know Scott?

12 A. Yes.

13 Q. And so I have some background -- and I'm
14 going to try to cut to the chase as much as I can. I'm
13:31 15 probably going to be a while with you, but I'm going to
16 try to cut to the chase as best I can. I'm not going
17 to try to plow old ground.

18 What I've been told is that there were
19 essentially two floor plans for Sportsman's Warehouse
13:32 20 buildings, and they varied by maybe five thousand
21 square feet. Is that accurate?

22 A. Yes and no. At that period of time, that's
23 probably close to accurate.

24 Q. Did you prepare all the Sportsman's
13:32 25 Warehouse --

17

1 A. Yes.

2 Q. -- plans?

3 A. (Witness nods.)

4 Q. Did you have like an A concept and a B
13:32 5 concept, general drawings?

6 A. Essentially, yes.

7 Q. And then I think Mr. Patience said that the
8 front of the buildings would vary by building to
9 building. Is that --

13:32 10 A. Correct.

11 Q. The interior of the buildings didn't vary
12 very much?

13 A. Correct.

14 Q. And I'm guessing most of these Sportsman's
13:32 15 Warehouse buildings went into developments that were
16 part of a bigger development. Is that usually true?

17 A. The majority, yes.

18 Q. And there would probably be different rules
19 and regs with each development.

13:33 20 A. Yes.

21 Q. So that each development would be somewhat
22 in terms of how the Sportsman's Warehouse

4 meter boxes that are in the sidewalk, is that an
13:33 5 unusual situation?

6 A. More often than not, the meter boxes are
7 placed in the planter or the asphalt instead of the
8 sidewalk, but they have occurred in the sidewalk in
9 other locations.

13:33 10 Q. Is that a desirable location, being in the
11 sidewalk rather than a planter or some other lesser --

12 A. Depends on the nature of the box.

13 Q. Could you explain that?

14 A. There are certain boxes -- how would you
13:34 15 say? An irrigation box you would like to have in a
16 planter, just typically that's where you're going to
17 want it. It's more sensible.

18 Meter boxes, you put them wherever the city
19 tells you to put them. And whether that's sidewalk,
13:34 20 driveway, there's different boxes, and they all serve
21 the purpose.

22 Q. So let me see what we have here. Looking
23 at Deposition Exhibit 2, I'm guessing the meter box is
24 the big box?

13:34 25 A. That would be my assumption, yes.

19

1 Q. And then the irrigation box is the box with
2 the cone on it?

3 A. Yes.

4 Q. The smaller box?

13:34 5 A. Yes.

6 Q. And what I understand you to say is the
7 meter box, it wasn't that unusual to have that in the
8 sidewalk or the driveway, the traveled portion of the
9 road.

13:35 10 A. Correct.

11 Q. But the irrigation box, typically you
12 wouldn't want it in the sidewalk; is that correct?

13 MR. WILLIAMS: Objection, form.

14 THE WITNESS: I'm not going to say wouldn't
13:35 15 want it. Typically, we would locate it in the planter
16 because it's associated with it, and it just takes it
17 out of the sidewalk.

18 Q. (BY MR. HEPWORTH) Does the bigger box,
19 what you call the meter box, does it have water service
13:35 20 to that box?

21 A. I assume so. I believe it does.

22 Q. And you have to build that box to city

4 sidewalk, do those standards vary from city to city?

13:35 5 MR. WILLIAMS: Object to the form.

6 Q. (BY MR. HEPWORTH) Do you understand my

7 question? That's maybe not a good question.

8 A. No. Clarify.

9 Q. And again, I'm trying to cut to the chase.

13:36 10 What Ray and Scott said was that when they build these

11 types of boxes, it's standard in the industry to build

12 them so that the variance between the height of the box

13 and the height of the sidewalk was no more than a half

14 inch.

13:36 15 A. I'm going to say you build it so that it's

16 flush. The desire is, regardless of city standard, the

17 industry standard is such that when you form up the

18 box, the box is formed either to a plate or through

19 some mechanism set up and checked through a leveling

13:36 20 device, whether with a laser or some other tool, so

21 that the top of it would be flush with the concrete.

22 Part of that is just the nature of concrete. Concrete

23 seeks its own level, and if the box were to be even a

24 half-inch less than that, the concrete is going to ooze

13:37 25 in and go over the top of it.

21

1 So it is not a standard practice to have

2 the box recessed any. You don't want it to stick up,

3 and if it were to be down, an eighth of an inch is

4 typically what you're going to find as a normal

13:37 5 tolerance.

6 Q. An eighth of an inch?

7 A. Yeah. A half inch is acceptable by code.

8 Q. Recognizing that it's difficult to have it

9 completely flush, there is some variance that's

13:37 10 allowed?

11 A. That's correct.

12 Q. And your variance would be one-eighth inch,

13 and in the worst case scenario --

14 A. My variation would be that that's allowed

13:37 15 by code or law, law being 88, which is a half inch.

16 And typically, if it's sticking up there and it looks

17 like a tripping hazard, we're going to note it.

18 Q. If it varied in height from the sidewalk

19 more than a half inch, you would agree that that would

13:38 20 be a hazard?

21 A. Yes.

22 Q. And that's true whether it sticks up too

* used in each location that it's used.

13:38 5 A. Do I, no.

6 Q. Who would specify that?

7 A. Typically, it's going to be the landscape

8 architect, civil engineer, depending on whose scope of

9 work that part of it falls under. We would be involved

13:39 10 in incorporating the specifications for that into the

11 master specification, we take a look at it, but to be

12 honest, if somebody specifies box number 147QBR1843, I

13 wouldn't know what that was.

14 Q. What Scott said was that the boxes were

13:39 15 already on site when he came onto the job site, and he

16 believed that it was placed there by the -- he called

17 it the developer. Is that consistent with your

18 understanding?

19 A. I'm going to say that's a correct

13:39 20 statement. I was on site when they were being

21 installed, and the developer's people were the ones

22 that were installing them. I didn't pay too much

23 attention to what was going on with it other than,

24 okay, why are we putting those at this location? Okay,

13:40 25 all right.

23

1 And that was the recollection. And I know

2 that somebody had to pour concrete back to it.

3 Q. Okay. And I guess what I'm getting at is

4 you personally did not specify the location or the make

13:40 5 and model of those two irrigation boxes?

6 A. Location, possibly, because we need -- if

7 that's the meter that serves the building, we would

8 say, this is where the line comes out of the building.

9 So in that context, in that extent of the location,

13:40 10 yes.

11 Q. Okay.

12 A. The rest of it is set by the city, and in

13 this case, the developer.

14 MR. BROWN: Let me just ask a clarification.

13:40 15 You said "boxes," and I was wondering if the witness was

16 referring to one box or the other in that statement.

17 MR. HEPWORTH: He just referred to the meter

18 box.

19 MR. BROWN: The meter box.

13:40 20 Q. (BY MR. HEPWORTH) I believe, weren't you?

21 You were referring to the meter box?

22 A. It could be taken to both. The city would

4 for use with -- my belief is it's intended for use with
 13:41 5 the planters in front of the building. This box may
 6 have fed these planters. At the same time, these pipes
 7 may have been run back over to the planters on the
 8 other side of the main drive. This may have been only
 9 intended for the planters that were up front.

13:41 10 My assumption is that there are additional
 11 pipes running underneath there which would have been
 12 sleeves for future installation of a planter, provided
 13 we're allowed to put one in in the future. That was
 14 the desire.

13:41 15 Q. And I'm going to explore that a little bit
 16 just to make sure I understand.

17 Now, the meter box, which is a utility box,
 18 basically, right?

19 A. Yes.

13:42 20 Q. It provides water to the building?

21 A. It could be for building and/or irrigation.
 22 That exact one, without going and seeing what it's
 23 marked for, I don't want to say yes or no to one way or
 24 the other.

13:42 25 Q. The box that you referred to as the meter

25

1 box, the bigger box, that would be located where it's
 2 located based on the city's direction; is that correct?

3 A. Yes.

4 Q. And then the smaller box, the irrigation
 13:42 5 box, that wouldn't be necessarily the city's direction,
 6 would it?

7 A. No. It could be. Typically, no.

8 Q. Typically, who would decide where that box
 9 goes?

13:43 10 A. Typically, the developer, the landscape
 11 architect, the landscape contractor.

12 Q. But it wasn't you?

13 A. No.

14 Q. At some point you found out that it was
 13:43 15 there, and did you have a discussion with the developer
 16 or anyone else about the fact that it is in the middle
 17 of the sidewalk?

18 A. Most likely. I could not tell you what the
 19 scope or -- it's too long ago to remember what it was.

13:43 20 I remember seeing it and I remember it going in.

21 My assumption is I probably asked, "Why is
 22 it being placed there?"

4 why it was located where it was located.

13:43 5 A. No. As I'm saying, I'm using my best
 6 judgment on what I would do in that situation.

7 Q. Okay. And I understand --

8 A. It's too long ago to say that I remember
 9 what went on there.

13:44 10 Q. There's a certain way you like to do
 11 things, and you have a habit and practice of how you
 12 design buildings and systems; is that correct?

13 A. Yes.

14 Q. And you designed and had involvement with a
 13:44 15 lot of Sportsman's Warehouse buildings.

16 A. Yes.

17 Q. And a lot of them, I'm sure, had
 18 landscaping in the front of the building, correct?

19 A. Yes.

13:44 20 Q. If you had been solely responsible for
 21 determining the location of that irrigation box, is it
 22 fair to say that's not where you would have put it, out
 23 in the middle of the sidewalk?

24 MR. WILLIAMS: Object to the form.

13:44 25 MS. CANNON: Join.

27

1 MR. WILLIAMS: Calls for speculation.

2 Q. (BY MR. HEPWORTH) That's what I'm
 3 gathering from what you're saying, and if I've
 4 misstated it, just tell me.

13:44 5 MR. WILLIAMS: Object to the form.

6 Misstates the testimony.

7 THE WITNESS: I'm saying typically it
 8 wouldn't be placed there. Whether I want it there or
 9 not would come down to a discussion with the contractor,
 13:45 10 the landscape architect, sometimes that's just the
 11 contractor, the developer.

12 That is the approximate location of where
 13 the planter would go, so if the planter was ever
 14 installed, it would make sense to place it at that
 13:45 15 location.

16 Q. (BY MR. HEPWORTH) You said "typically
 17 wouldn't be placed there." What did you mean by that?

18 A. The same thing I said earlier. Typically,
 19 they're placed inside of a planter.

13:45 20 Q. Is there a reason why you typically put
 21 them inside a planter?

22 A. Because it's associated with the

4 Have you reviewed the photos of the
 13:46 5 irrigation box that were taken following this accident?
 6 A. I've seen two or three photos.
 7 Q. Tell me what you saw in the photos.
 8 A. I saw a box which has clearly settled or
 9 been driven down from its original position.
 13:46 10 Q. Do you know, have you attempted to
 11 determine how far it's settled or been driven down?
 12 A. I have looked at the photos, and I also
 13 recall a specific number being given of an inch and a
 14 half. From what I see in the photos, I see it varying
 13:46 15 from three-quarters to maybe an inch and a quarter at
 16 the most.
 17 Q. I believe in your affidavit, you indicated
 18 that the irrigation box was not settled at the time of
 19 completion of the construction. Is that correct?
 13:47 20 A. That's correct.
 21 Q. Do you recall specifically doing the
 22 inspection on the Twin Falls Sportsman's Warehouse
 23 building?
 24 A. I do.
 13:47 25 Q. Do you remember who attended that

29

1 inspection with you?
 2 A. Ray Patience, the manager. And I don't
 3 know if it was John at that time or who, Sportsman's
 4 Warehouse. And he was hit and miss. The developer was
 13:47 5 present for parts of that. I couldn't tell you who,
 6 whether it was the contractor or a specific person with
 7 the developer.
 8 Q. Was it a man or a woman?
 9 A. I believe it was a man.
 13:47 10 Q. All right. Do you remember approximately
 11 how old?
 12 A. No.
 13 Q. So you, Ray Patience, the Sportsman's
 14 Warehouse manager, who you believe was John?
 13:48 15 A. Uh-huh.
 16 Q. And someone from the developer who you
 17 believe was a male.
 18 A. Yes.
 19 Q. Do you remember approximately what date
 13:48 20 that would have been?
 21 A. Only because I've recently looked up --
 22 looked it up. It was probably close to September 5th,

4 issues that the city inspectors have when they're doing
 13:48 5 the final closeout, we can be present.
 6 Q. How did you come up with the September 5th
 7 date?
 8 A. That was the day that the city signed off
 9 on the building, as far as we could tell.
 13:48 10 Q. On the certificate of occupancy?
 11 A. Right.
 12 Q. Okay. So you've reviewed the certificate
 13 of occupancy, which is dated September 5, 2003?
 14 A. Uh-huh.
 13:49 15 Q. And you believe your inspection would have
 16 been right around that time?
 17 A. Yes.
 18 Q. But you specifically recall doing it with
 19 the people that you've identified?
 13:49 20 A. Yes. Most of that was done with Ray
 21 Patience and myself.
 22 Q. How long did that inspection take,
 23 approximately?
 24 A. A day, day and a half.
 13:49 25 Q. And I believe it's your testimony from your

31

1 affidavit that at the time of the inspection, the two
 2 boxes were flush with the sidewalk; is that correct?
 3 A. Yes.
 4 Q. If the boxes were not flush with the
 13:49 5 sidewalk, and were, you know, an inch or an inch and a
 6 half lower than the sidewalk, is that something that
 7 you would have seen?
 8 A. Yes.
 9 Q. How certain are you that you would have
 13:49 10 noticed a defect like that?
 11 A. Ninety-five percent plus.
 12 Q. You would agree that that inch and a half
 13 variance in height is a defect?
 14 A. Yes.
 13:49 15 Q. And you would agree that it's a hazardous
 16 defect, true?
 17 A. Yes.
 18 Q. And what I understand your testimony to be
 19 is that hazardous condition developed subsequent to the
 13:50 20 time you inspected the building on or about September
 21 5, 2003.
 22 A. Yes.

4 Q. What are your two or three --

13:50 5 A. The most probable cause would be that

6 somebody drove something over the box and was weighted

7 more than what typically would be seen on a sidewalk.

8 That could have pushed it down.

9 Q. Okay. What's the next most likely?

13:50 10 A. That there was water coming from a

11 sprinkler valve which was active, and if that valve box

12 were feeding these planters in front would be the only

13 way I would see that being active, that water over time

14 potentially could have caused some settlement, such as

13:51 15 a stuck valve. If a valve were to stick open for a

16 long period of time, erosion or settlement could have

17 occurred.

18 But I doubt the box would have moved unless

19 something pushed it down. So the first is my -- I

13:51 20 think that is what caused it to go down.

21 I don't think it would have settled on its

22 own because there's enough friction between the

23 concrete and -- typically, these are a heavy duty

24 plastic and/or composite fiber, which is -- they'll

13:51 25 bind to it. Just having somebody jump up and down on

33

1 it, I don't know that I've seen something like that

2 cause it to settle.

3 Q. And you said there might be two or three.

4 Is there a third?

13:52 5 A. Those are the two primary ones that would

6 have caused it. There could have been -- that's really

7 what it comes down to as the causes, those two items.

8 The others all stem from them.

9 Q. Water combined with some force down to

13:52 10 depress it?

11 A. Yes.

12 Q. Or just force without water?

13 A. Yes.

14 Q. But both would involve some amount of

13:52 15 force, in your opinion?

16 A. Yes.

17 Q. In your opinion, once the box had settled

18 an inch to an inch and a half, it should have been

19 fairly conspicuous to someone?

13:53 20 MS. CANNON: Objection, speculation.

21 THE WITNESS: I'm going to say that's a

22 matter of speculation. It's relative to those people,

4 Q. Objection.

13:53 5 A. Fairly good. An inch and a half you should

6 be able to see. A distraction could take your eye away

7 from it.

8 Q. Obviously, the more familiar someone was

9 and the more frequently they were at the location, the

13:53 10 more likely it is that they should see it?

11 A. Yes.

12 Q. And the inverse would also be true, it's

13 less likely that a first-time shopper at Sportsman's

14 Warehouse would see it than someone who was there all

13:54 15 the time?

16 A. Yes and no. I mean, an inch and a half is

17 a fairly -- that's a fairly noticeable height just as

18 far as what it is. The fact that it's a different

19 color, the person's eyesight, there's a lot of factors

13:54 20 that would go into something like that.

21 Q. Has anybody talked to you about repairing

22 that condition?

23 A. No.

24 Q. Do you have any knowledge of whether

13:54 25 repairs were done or who did them?

35

1 A. I know that the planter was put in, and I

2 don't know all of -- I don't know whether the box was

3 moved, taken out or is still there. I don't have an

4 answer to that one. But I do know that the planter was

13:55 5 put in. That's the approximate location, which would

6 be approximately this grid line that you're seeing

7 here, someplace right about where the planter is. My

8 assumption is that it would have been altered during

9 the course of that construction.

13:55 10 Q. How did you know that a planter was put in?

11 A. Because we did drawings to have a planter

12 put in.

13 Q. When did you do that?

14 A. Last year? Sometime in 2008, I believe.

13:55 15 Q. Who did you do that work for?

16 A. Sportsman's Warehouse.

17 Q. So Sportsman's Warehouse is the one that

18 specified that a planter be put in that location?

19 A. Yes. They had received approval from the

13:55 20 landlord, the owner, the developer, which they'd been

21 trying to do for quite a long time.

22 Q. Who at Sportsman's did you work with in

4 approved and get it done."

13:56 5 Q. The reason I ask is I don't know who the
6 developer is. Everybody uses the word "developer," but
7 no one seems to know a person's name.

8 A. If somebody knows who the owner of the
9 property is, that's as close as I can get.

13:56 10 Q. But whoever hired you to put the planter in
11 from Sportsman's would probably have had some dealings
12 with the developer; is that true? You said they had to
13 get permission, and they'd been working on getting
14 permission for quite some time.

13:56 15 A. Sportsman's had to do that. My guess is
16 the contractor would have checked in or arranged with
17 the development, whether themselves or through the
18 store manager, to do the construction. We also had to
19 go to the city to get a permit.

13:56 20 Q. What was the name of the store manager,
21 again?

22 A. Well, I don't know who it was at that time.
23 I believe it's someplace in all of the paperwork that
24 was sent to me, but as to who it was --

13:57 25 MR. WILLIAMS: John, you mentioned?

37

1 THE WITNESS: Yeah, John was who was there
2 originally.

3 Q. (BY MR. HEPWORTH) And you don't know
4 John's last name?

13:57 5 A. Right off, I'm going to say I don't
6 remember. I do know what it is, but I can't remember
7 now.

8 Q. You would agree that the irrigation box
9 that sunk an inch to an inch and a half was in
13:57 10 violation of all standards that you're familiar with?

11 A. After it sunk, yes.

12 MS. CANNON: That's all I have.

13

14 EXAMINATION

15 BY MS. CANNON:

16 Q. Mr. Anderson, my name is Nicki Cannon, with
17 Canyon Park, et cetera, et cetera. I think they have
18 three variations of their names, different companies.

19 A. Are you the developer?

20 (Laughter.)

21 Q. I guess I'm the developer. Who knew.

22 MR. HEPWORTH: We're going to get her under

4 Q. Did you personally prepare
13:58 5 that blueprint?

6 A. No.

7 Q. Who else in your firm worked on those
8 blueprints?

9 A. I would have to check my records to see who
13:58 10 was employed there at that time. There was also a
11 mechanical engineering firm, which was done as a design
12 build. The firm would have been CCI Mechanical. BNA
13 did the electrical.

14 Q. I'm sorry, B --

13:58 15 A. B, Brian, Nelson, Architect.
16 And structural engineer, I don't know if it
17 was done at that time, and I don't remember where our
18 structural engineer was at that point. He wouldn't
19 have been involved in anything that's going on with it,
13:58 20 as far as your litigation.

21 Q. But you believe you may have records that
22 you could check? You said earlier that some of your
23 records from that time had been destroyed; is that
24 correct?

13:59 25 A. That is correct.

39

1 Q. Do you know whether or not records that
2 would tell you which of these folks worked on which
3 portions of the blueprint would still exist?

4 A. We could check and see if there was a name
13:59 5 on each page, and then based on that name, I could take
6 a guess as to which one of the employees it was. That
7 was, what, 2002, 2003. We weren't real big at that
8 point, so not too many people.

9 Q. How many employees at that time did you
13:59 10 have, do you recall offhand?

11 A. Any place from five to eight.

12 Q. As the architect, what can you tell me
13 about your responsibilities as far as signing off on
14 the whole plan itself? And I'm probably using
14:00 15 incorrect terminology. I'm not very familiar with what
16 architects do, to be honest with you.

17 A. As an architect, it is my responsibility to
18 review the drawings and state that they have been
19 prepared substantially underneath my supervision. In
14:00 20 other words, the word "architect" means the master
21 builder. I think that's the correct translation. As
22 such, we coordinate structural, mechanical, electrical,

4 you wanted them to do in the first place?

14:00 5 A. Yes.

6 In this case, we would have been dealing

7 with two sets of entities. One is Sportsman's

8 Warehouse, the other is your side, the developer. And

9 based on point of completion and where we're at -- and

14:01 10 I don't have the drawings in front, and at this point,

11 there are so many of these, I am not going to say which

12 one of so many scenarios it is -- we may have said,

13 this is where our line needs to come out, planter box,

14 and we may have even drawn the planter box on and were

14:01 15 told later that we could not construct that. We put

16 the drawings together based on a prototype which is

17 what we want, and we try and fit that.

18 Q. What about with regard to the

19 specifications, who prepared specifications for the

14:01 20 Twin Falls Sportsman's Warehouse?

21 A. The same group of people.

22 Q. And again, do you know whether or not you

23 would still have some records that you could check with

24 to see --

14:01 25 A. We have a set of specifications.

41

1 Q. Okay. And from your set of specifications,

2 would you be able to determine which of the group of

3 people actually wrote which of the specifications?

4 A. For the most part, yes.

14:02 5 Q. Did you review the specifications before

6 coming here today?

7 A. No.

8 Q. Did you review the blueprints or plans

9 before coming here today?

14:02 10 A. Briefly, yes.

11 Q. They're fairly lengthy or large, aren't

12 they?

13 A. Without knowing what to look for, it's -- I

14 could look, needle in a haystack type thing. Mostly

14:02 15 just refreshing my memory, looking at photographs to

16 see if there was anything new that I could see. And I

17 believe we also turned over the photographs we have,

18 which are mostly preconstruction.

19 Q. Do you have any recollection whether or not

14:03 20 there was any change between the bid blueprints and the

21 construction blueprints for the Twin Falls Sportsman's

22 Warehouse?

4 A. There typically are changes.

14:03 5 Q. And do you have copies of each set of those

6 plans?

7 A. I don't know that we have each set.

8 Typically what we keep is the final set, which we'll

9 keep the red lines for a period of one to three years.

14:03 10 After that, we would have -- this room would be full.

11 So we keep the final copy of as-builts, which, to the

12 best of our knowledge based on information provided to

13 us by all the contractors, is how they built it.

14 Q. You said that you had made a site visit at

14:04 15 one point in time. Do you recall how many site visits

16 you made to the Twin Falls warehouse?

17 A. I couldn't say the exact number, but some

18 of them were prior to construction, so -- say, six

19 total would be fairly close.

14:04 20 Q. And that's spread out throughout the period

21 of construction?

22 A. Yes.

23 Q. Preconstruction, construction?

24 A. Well, it's during permitting, punch list

14:04 25 and final punch.

43

1 Q. And do you have both the punch list and the

2 final punch?

3 A. We do not have a final punch. We only have

4 one document, which was stored electronically. The

14:04 5 date on that document, the last time it was modified,

6 was September 12th. Typically when that occurs, it

7 means we went back and did a walkthrough and all items

8 had been corrected, so there was no reason to do a

9 final punch list, because anything that was required to

14:05 10 be resolved had been done so at the time of the

11 opening.

12 Q. What can you tell me about the condition of

13 the construction site prior to Eckman Mitchell doing

14 any work there?

14:05 15 A. A lot of -- a lot of lava.

16 Q. A lot of lava. Very unpleasant?

17 A. A lot of rock. And I mean, it was an open

18 field, which looked like an open field on the surface,

19 but based on the geotechnical report, we knew that

14:05 20 there was a lot of solid rock underneath the project.

21 Q. Did it cause you any concern?

22 A. No. It's just, okay, the price is going to

4 contract limits that the developer required?

14:06 5 MR. WILLIAMS: Object to the form,
6 foundation.

7 THE WITNESS: I would have to review the
8 lease to find out, because, I mean, are you supposed to
9 deliver the pad? Were we supposed to take it as a raw
14:06 10 site and bring it up?

11 I know that we had to blast for the
12 footings, but I do not recall whether you delivered a
13 pad ready site. I'm assuming utilities had to be
14 brought into it. And that's one of the things that
14:06 15 probably changes more often than anything else, is how
16 utilities are routed around the building, depending on
17 the development.

18 Q. (BY MS. CANNON) Do you recall at the time
19 Eckman -- well, were you present when Eckman Mitchell
14:06 20 was just starting their construction?

21 A. The early stages, like, as I say, they were
22 blasting, excavating for the footings.

23 Q. And do you remember what condition the area
24 that would eventually become the parking lot area was
14:07 25 in at that time, when they were blasting for the

45

1 footings?

2 A. Without going back and reviewing the
3 pictures, it seems like most of it was in, but it may
4 be that it wasn't. I don't recall.

14:07 5 Q. It was a long time ago.

6 A. Yes.

7 Q. Many Sportsman's Warehouses ago.

8 A. Oh, which there is.

9 Q. Do you remember if after you noticed the
14:07 10 two boxes in the sidewalk and presumably had this
11 conversation about is there a reason these are here or
12 not, did you have any conversations with your
13 mechanical engineer who helped you with these plans
14 about those boxes and whether their placement was
14:08 15 appropriate in the engineer's opinion?

16 A. I would not have done that because that's
17 outside our scope of work. In this case, the boxes
18 were provided by the developer, which was outside of
19 our scope.

14:08 20 The fact that they're behind the sidewalk,
21 that's within our scope, so why are they putting these
22 boxes there? I would have thought they

4 it."

14:08 5 We do this largely on a design build basis,
6 so it's done as a team.

7 Q. But you can't say who exactly said, "Nope,
8 we're putting them here"?

9 A. No, I can't.

14:08 10 Q. Do you know if after this occurred and
11 everyone was figuring out where to place them, how to
12 work around that, were there any specific written
13 exceptions regarding the placement of those boxes,
14 since they were within the sidewalk area, which
14:09 15 apparently was within your work zone, so to speak?

16 MR. WILLIAMS: Object to the form.

17 THE WITNESS: None that I'm aware of.

18 Q. (BY MS. CANNON) Is that something that
19 would typically happen, in your experience?

14:09 20 MR. WILLIAMS: Object to the form.

21 THE WITNESS: If there was a major issue
22 concerning it.

23 Q. (BY MS. CANNON) Had you experienced that
24 before?

14:09 25 A. Experienced what?

47

1 Q. You said "if there was a major issue
2 concerning the item." Had you had that happen before?

3 A. No.

4 Q. Do you know who was responsible for the
14:09 5 day-to-day supervision of the building site for the
6 Twin Falls Sportsman's Warehouse?

7 A. A combination of Ray Patience and -- I've
8 got to remember his name. I know who it is. It's,
9 again, Paul Miner.

14:10 10 Q. Paul Miner.

11 Earlier, when Jeff was asking you
12 questions, you were saying that you believed it was
13 likely either force or force plus water, some
14 combination, that caused the apparent settling of the
14:10 15 green irrigation box; is that correct?

16 A. Force being what caused it to actually
17 settle. Conditions allowing the force to cause it
18 could have simply been the force or the force with a
19 combination of water.

14:10 20 Q. If the area had been saturated by a leaky
21 valve or something else that you mentioned, do you have
22 any opinion of whether or not normal foot traffic would

4 that's evidence that there was force involved with it
 14:11 5 from the jaggedness of the surface adjacent to the box.
 6 Q. Okay. Would the compaction of the material
 7 that the box was placed onto have any bearing in this
 8 force or water equation that we've been discussing?
 9 A. Depends on the nature of the material. And
 14:11 10 I'm trying to think of the best way -- there's too many
 11 factors to say yes or no without looking at the
 12 situation that is present inside the box. If there was
 13 no water inside there to begin with, and the valve box
 14 is not active, that whole issue doesn't even exist. If
 14:12 15 there was, and the example would be, take a hose and
 16 you turn it on full blast, this is probably a three-
 17 quarter or one-inch valve box, and you just let that
 18 thing go, it's got to go someplace, and if it's hitting
 19 the side of the box, the odds of erosion are minimal.
 14:12 20 If it's coming out and spewing off to the side or down,
 21 it could displace rocks up to an inch and a half,
 22 depends on how long it -- there are so many factors
 23 that without an analysis of, okay, what really happened
 24 there, there's no way I could answer that.
 14:12 25 Q. Okay.

49

1 A. It is probable, but I don't know.
 2 Q. When you are designing these Sportsman's
 3 Warehouse buildings, and I don't know if I'll be able
 4 to word this correctly to get what I'm after, what time
 14:13 5 frame for longevity of that site do you design for?
 6 A. We're going to go for the extent of the
 7 lease, which is any place from 20 to 30 years.
 8 Q. Is that typical for all the sites or are
 9 you talking about the Twin Falls one specifically?
 14:13 10 A. Typical. If we have our druthers, we're
 11 going to make them go for a hundred, but in the case of
 12 retail, we've learned -- in terms of retail, we know
 13 that retail is 10 to 20 years. But our longevity for
 14 Sportsman's, their maximum lease is 30 years, so it's
 14:14 15 going to be either 20 or 30 years. Potentially, it
 16 could be 50 years.
 17 Q. When we were speaking with both Scott and
 18 Ray earlier, I asked them about whether or not they
 19 were given any direction for this particular site for
 14:14 20 following the blueprints precisely, and they could not
 21 recall specifically.

22 When you have designed the plans for all of

4 Q. It's in the specs. Do you recall for this
 14:15 5 Sportsman's Warehouse who that person was?
 6 A. It would have been myself.
 7 Q. Do you recall giving authority for any
 8 variances from the plans on the Twin Falls Sportsman's
 9 Warehouse?
 14:15 10 A. Yes.
 11 Q. Do you recall for what?
 12 A. No.
 13 Q. Is that something that's fairly
 14 commonplace?
 14:15 15 A. Yes.
 16 Q. It might be for any number of items on any
 17 given store?
 18 A. Yes.
 19 Q. Do you have any records that you could
 14:15 20 review that would tell you what you might have
 21 authorized for the Twin Falls Sportsman's?
 22 A. At this point in time, it does not appear
 23 that we did.
 24 Q. Probably not. They were some of the ones
 14:15 25 that were --

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1 A. We've got hit and miss how many are
 2 actually there. Part of them -- most of the files we
 3 have remaining are electronic, and as we went through
 4 the backup files, as late as yesterday, on my computer,
 14:16 5 I could only retrieve one of them, one of the folders.
 6 On another one, we were able to retrieve the majority.
 7 But not everything is accessible. We're finding as
 8 secure as DVDs and CDs are, they do have a lifespan, so
 9 we're altering how we store our data.
 14:16 10 Q. Another rude awakening, isn't it?
 11 A. Oh, it is, rude and embarrassing at the
 12 same time.
 13 Q. And do you know who compacted the site
 14 where the sidewalk was ultimately poured around those
 14:17 15 boxes?
 16 MR. WILLIAMS: Object to the form.
 17 THE WITNESS: I believe there were two
 18 groups. One was Eckman & Mitchell compacted the entire
 19 site. When the work was done for the boxes, that was
 14:17 20 done by the site contractor.
 21 Q. (BY MS. CANNON) Do you know who the site
 22 contractor was?

4 restroom break, five minutes?

14:17 5 (Recess taken.)

6

7

EXAMINATION

8 **BY MR. BROWN:**

9 Q. Mr. Anderson, my name is Jeremy Brown, and

14:23 10 I think we introduced ourselves earlier. I'm an

11 attorney for Sportsman's Warehouse. And we probably

12 could have pushed through before that break because I

13 don't have many questions for you, but let me get to

14 them.

14:23 15 You mentioned earlier, in response to a

16 question about the preparations of the building site,

17 and you referenced that would depend on where the lease

18 sat as far as pad preparations?

19 A. Yes.

14:23 20 Q. And what does that usually entail, what did

21 you mean by that?

22 A. Typically, it's defined by any of several

23 factors, one being a geotechnical report that says,

24 these are the requirements for the pad, you need so

14:23 25 much soil, if there's rock, so much has to be taken

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1 out, what parameters you have to do it. And based on
2 the lease, whether utilities come in, whether we have
3 to go out and do the connections, just what it is.

4 From what I remember, this is one where

14:24 5 you, the developer, had to bring the utilities to us.

6 We would step out past our contract limit line.

7 There's exceptions to that. We always asked that the

8 developer bring the fire riser inside the building.

9 That way, we could flush the whole system out one time.

14:24 10 I mean, I can go on for an hour and a half

11 on this one, but in essence, the geotechnical report

12 will tell you what to build.

13 Pad ready means that we would come in, and

14 it depends again on the lease, either with or without

14:24 15 the last four inches of base. It's a base course that

16 goes on before you pour the concrete on it. Sometimes

17 the developer was required to put in that base,

18 sometimes Sportsman's or Eckman was.

19 Q. I don't want to spend a lot of time on

14:25 20 this, but you're saying that if the contract calls for

21 it to be pad ready, that means that the last four

22 inches is in place when Eckman arrives; is that

4 Q. Okay. And you may not know this on the

14:25 5 top of your head. Am I understanding that the

6 Sportsman's Warehouse buildings are fairly uniform, the

7 buildings themselves, as far as the square footage? Is

8 that correct?

9 A. At that point in time, yes.

14:25 10 Q. Do you know what that square footage was?

11 A. I'm thinking at that point we were between

12 40 and 46 thousand square feet.

13 MR. BROWN: That's all I have. Thank you.

14

15

EXAMINATION

16 **BY MR. WILLIAMS:**

17 Q. I just have a few questions, and excuse me,

18 I've got allergies, you've got a cold.

19 My questions are similar to Jeremy's. I

14:26 20 was a little confused. I believe Ray Patience

21 testified just before you that when they came to the

22 site, it was pad ready. Do you have any reason to

23 doubt that or --

24 A. No.

14:26 25 Q. Okay. And I think Ray and/or Scott

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1 testified that in the area that we're talking about in

2 this lawsuit, this little sidewalk where the irrigation

3 and other boxes are, that portion was ready to go and

4 it had already the dirt brought in, compacted, and we

14:27 5 just poured the concrete. Any reason to dispute,

6 disagree with that?

7 A. No. To clarify, typically on a lease, the

8 back of curb is the end of our contract limit line.

9 Typically, the developer will put in the curb and they

14:27 10 prepare the pad out to that in a pad ready situation,

11 which means all we do is come back, final grade it, all

12 the contractor has to do is final grade it, excavate

13 for footings, utilities, through that pad surface.

14 Otherwise, it's already there.

14:27 15 Q. You just pointed to Exhibit 2, and we can

16 all see where your finger was, but if you would

17 verbally describe, if you can --

18 A. There's a line --

19 Q. -- for the record.

14:27 20 A. -- that reaches the back of curb, which is

21 behind the gutter, and you've got probably an 18-inch

22 gutter and a six-inch curb. In this photo, it's the

4 Is that consistent with what you understand? And if
14:28 5 I've got the wording wrong -- and I'm a neophyte as
6 well -- and I think he testified that to his knowledge,
7 no compaction studies were done for this sidewalk area
8 because none are required.

9 **A.** What's required is if we have a pad ready
14:28 10 site, the developer is responsible to certify the pad,
11 which means it has been prepared in conformance with
12 the geotechnical report. That's as far as the type of
13 materials used, the compaction and elevation.

14 **Q.** Okay. But in any event, Scott Duke and Ray
14:29 15 Patience testified that preparation or that work, those
16 requirements you just mentioned, were already done.
17 They just poured the concrete and formed the concrete
18 around the boxes. Do you have any reason to dispute
19 that?

14:29 20 **A.** None.

21 **MR. WILLIAMS:** That's all I have. He may --

22 **MR. HEPWORTH:** I have a couple of questions
23 just to follow up.

24
25 //

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4 for the pad for Sportsman's, it's a pretty good one
14:31 5 underneath that.

6 **Q.** Do you as an architect design like the Twin
7 Falls Sportsman's Warehouse sidewalk anticipating that
8 it will be driven on?

9 **A.** To a certain degree, in the back of my
14:31 10 mind, we know that what is there is capable of being
11 driven on. And nobody has informed us that anybody
12 intends to drive a semi, which we wouldn't expect to
13 see up there. Most average load vehicles the sidewalk
14 is capable of handling. And a lot of these boxes
15 should be able to handle that.

16 **Q.** As Sportsman's Warehouse's architect, did
17 you anticipate that that sidewalk would be driven on?

18 **A.** At that point in time, not so much.

19 **Q.** Even though you knew that on occasion
14:32 20 Sportsman's Warehouse puts boats on the sidewalk?

21 **A.** That would be a fair statement.

22 **Q.** And you knew that they would have to drive
23 a car in order to put the boat on the sidewalk?

24 **A.** If they did so, yes.

14:32 25 **Q.** And therefore, the compaction should be

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FURTHER EXAMINATION

2 **BY MR. HEPWORTH:**

3 **Q.** The box covers on the boxes, the irrigation
4 box, the meter box, are those designed so that they can
14:29 5 be driven over, do you know?

6 **A.** It would depend on each box. Looking at
7 this one, that's cast iron. My guess is yes.
8 Typically, a city meter box, whether it's on the
9 sidewalk or on the street, would be designed for what's
14:30 10 called an HD-20 load, which is for a semi.

11 **Irrigation boxes, typically you can drive**
12 **over the green boxes. They are designed for that.**
13 **There's various boxes. Again, I don't know what was**
14 **specified, and I don't know the specifications for this**
14:30 15 **box.**

16 **Q.** Would you expect cars to be driven on the
17 sidewalk?

18 **A.** On occasions at Sportsman's, I have seen
19 boats backed onto it, and associated with that, you
14:30 20 could have a car that would back on to it. With
21 Sportsman's, occasionally.

22 **Would I expect sidewalks? You don't intend**

1 sufficient to be driven on, too, right?

2 **A.** Yes.

3 **Q.** The sidewalk should be designed and built
4 so that when someone drove over it, it didn't sink;
14:32 5 would you agree?

6 **A.** Yes. I'd say it was.

7 **Q.** So earlier you said that it was your
8 opinion that there had to be a significant amount of
9 force on the box to make it sink, and it wouldn't be
14:33 10 just someone walking over it, it would have to be a
11 significant force like a car?

12 **A.** That would be one thing that could cause
13 that, yes.

14 **Q.** And if it was designed and constructed
14:33 15 properly, it would not sink even if it was driven over
16 by a car, correct?

17 **MR. WILLIAMS:** Object to the form.

18 **THE WITNESS:** I don't know that that's a
19 valid statement. It would depend on the situation of
14:33 20 that box and how it was constructed underneath it and
21 whether or not there was water involved. Water could
22 have lended (sic) to possible failure. Again, force is

4 MR. WILLIAMS: Object to the form. You say
 14:34 5 "it." Are you referring to the box or the sidewalk?
 6 MR. HEPWORTH: I'm talking about the
 7 irrigation cover that sunk.
 8 MR. WILLIAMS: Okay. Go ahead and answer.
 9 THE WITNESS: Typically. Failures can
 14:34 10 always take place.
 11 Q. (BY MR. HEPWORTH) Pardon?
 12 A. Failures can always take place. Even if it
 13 was constructed properly, there could be a condition
 14 that could cause it to fail.
 14:34 15 Q. If there was water in the box, and it was
 16 driven over, that would make it much more likely to
 17 fail, true?
 18 A. Much more likely.
 19 MR. HEPWORTH: That's all I have.
 14:34 20 MS. CANNON: A few more from me, if that's
 21 all right.
 22 May I, Brad?
 23 MR. WILLIAMS: Oh, yeah. Yeah. Sure.
 24
 25 //

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4 A. Clarify your question.
 14:36 5 Q. From Eckman Mitchell Construction.
 6 A. No one.
 7 Q. No one?
 8 Who, if anyone, would be involved in that
 9 initial coordination?
 14:36 10 A. Clarify what you mean by "initial
 11 drawings."
 12 Q. I thought you had said initial
 13 coordination.
 14 A. Yes.
 14:36 15 Q. And I'm asking what is initial
 16 coordination, I guess. I'll backtrack.
 17 A. Initial coordination is the work that is
 18 done to prepare to go to the city to receive approval
 19 from the developer, all the way down to the initial
 14:37 20 plan that says, here's where we need our utilities to
 21 come in. And all that is is a site plan where we take
 22 our standard locations for utilities, planters,
 23 everything else, say, here it is.
 24 At that time, quite often the developer
 14:37 25 says, okay, we've agreed on this based on where it is.

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1 **FURTHER EXAMINATION**
 2 **BY MS. CANNON:**
 3 Q. Did I understand you earlier that you had
 4 designed the Twin Falls Sportsman's Warehouse with the
 14:35 5 decorative planter in front, I mean, originally?
 6 A. I said that was a possibility. We would
 7 have started off with showing it, and we were told, you
 8 can't do that, so we would have taken it off at some
 9 point. And according to the drawings that were done
 14:35 10 for construction, we do not show the planters.
 11 Q. So at least the drawings that the
 12 contractors and whatever subcontractors they were
 13 working with had, it did not show the planter?
 14 A. I can't say that. One of the sets that
 14:35 15 they would have had may have shown it. Another set may
 16 not have. There is that possibility.
 17 Q. Would Mr. Miner perhaps know if any of the
 18 sets that were being used had that planter on it?
 19 A. I don't think that he would have. From his
 14:35 20 perspective, he would have been -- by the time he
 21 showed up on the site, he would have been furnished
 22 with the set of drawings for construction. The set of

1 They've got dimensions to where they want the utilities
 2 to come in. We're going to go ahead and construct it
 3 before they've done their drawings or anything else.
 4 That's one scenario. There's about 20 more. I don't
 14:37 5 know if you -- that's the one extreme.
 6 The next extreme is, okay, we've done
 7 drawings, everybody's agreed to it, but nobody's told
 8 us that the planters are out of the agreement yet, so
 9 we've done a set of drawings that still shows planters
 14:37 10 we submit to the city, and then we find out and we take
 11 them off.
 12 There's a lot of scenarios to that.
 13 Q. You're saying "we." Who are you talking
 14 about when you say "we"?
 14:38 15 A. "We" being the architect's office, myself,
 16 all the way through Sportsman's, the attorneys. It's a
 17 team. We're doing this design build. And so --
 18 Q. That's what I'm after. Who's on the team,
 19 typically?
 14:38 20 A. Typically, the architect, mechanical
 21 engineer, electrical engineer, structural engineer,
 22 Sportsman's, and the contractor, at a certain point we

4 largely that is done through myself or another
14:38 5 representative. But at that period of time, most of
6 that was done through me.

7 Q. If there was a set of blueprints that got
8 out that had the planter on them, would that be
9 possibly one explanation for why that particular
14:39 10 irrigation box was in that place, because someone
11 thought they were taking something to what would
12 eventually be a planter that was going to need
13 irrigation?

14 A. That is a possibility.

14:39 15 Q. Do you have any idea whether or not that
16 happened?

17 A. As far as I know, neither of these were
18 shown on any of the drawings from the developer or from
19 us. There's a pipe that sticks out, as far as what
14:39 20 we've got, and on the as-built, these may show up on
21 there, but those most likely don't show up on our
22 drawings. And at the time that we started this, I
23 can't find anything that shows these were on the
24 developer's drawings.

14:39 25 Q. So they're not on drawings that we're aware

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1 of to start with?

2 A. Right.

3 Q. And you certainly can't say who said, we're
4 going to put these here?

14:40 5 A. This is one of these scenarios that is a
6 field change that becomes an as-built condition because
7 there was a need to change it either by the city, the
8 developer, or something else that I couldn't tell you
9 what it was.

14:40 10 From everything I've been able to find out,
11 I'm not sure -- and that's why it kind of stands out.
12 This is -- okay, normally we would have seen this here,
13 this has got to be over here, it's here, the city said
14 to put this here, somebody has a reason for why they're
14:40 15 there. Okay, well, just -- you know.

16 Q. Go ahead and do it?

17 A. And, you know, put them in. It's your
18 spec. Go ahead. We'll pour up to it.

19 MS. CANNON: Okay. Thank you. I'm really
14:41 20 done this time.

21

22

FURTHER EXAMINATION

4 asked a question, if it was designed or constructed
14:41 5 properly, and I objected to what he was referring to.
6 I think he was referring to the box, but let's just go
7 back so we have a clear record.

8 I think you've testified already, who
9 designed the sidewalk around the two boxes?

14:41 10 A. We did the sidewalk.

11 Q. "We" being?

12 A. Largely, I'm going to say the architectural
13 firm. All we're doing is showing four inches of
14 concrete on top of a base which is per the soils
14:42 15 report.

16 Q. And it's fairly clear that as far as the
17 construction, Eckman Mitchell constructed the sidewalk?

18 A. The sidewalk, yes. The boxes, no.

19 Q. Okay. Now let's go to the boxes
14:42 20 themselves. Who designed the boxes? And that breaks
21 down into who designed their location? I think you've
22 already testified to that.

23 A. It depends on what the boxes are --

24 Q. Forget the city meter. That's clear. Just
14:42 25 who designed the location, if you know, of the

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1 irrigation box?

2 A. I do not have a name, but it would have
3 been on the developer's side --

4 Q. Okay.

14:42 5 A. -- as far as...

6 Q. It wasn't Eckman Mitchell that designed the
7 location, correct, or you, it was the developer?

8 A. Excuse me. That's correct.

9 Q. And there have been questions about --
14:42 10 let's go to the causation. I think in your opinion,
11 you've testified you don't know for sure what caused
12 this, but there are several possibilities, correct?

13 A. Yes.

14 Q. One of those being force, correct?

14:43 15 A. Yes.

16 Q. One of those being water or water plus some
17 force, correct?

18 A. Yes.

19 Q. As to the force one, I don't think this has
14:43 20 been asked, could it have been a single episode of
21 force, as in a semi parking right on that, or could it
22 have been multiple instances of cars, trailers, boats

4 photograph was taken?
 14:49 5 A. Yes.
 6 The photograph was taken in 2005.
 7 Q. Okay. That's fine.
 8 A. The middle of winter.
 9 Q. And what about the one with the ruler in
 14:49 10 it?
 11 A. I don't know.
 12 MR. WILLIAMS: I don't know if it has a date
 13 on it.
 14 THE WITNESS: Here's something over here
 14:49 15 that says 2007.
 16 Q. (BY MR. BROWN) So if it was a gradual
 17 settling, could there have been changes from the time
 18 of 2005 until when that ruler was placed in there in
 19 2007?
 14:49 20 A. Yes.
 21 Q. And could that have occurred even if it was
 22 initially started by a force on top of the box?
 23 A. Yes.
 24 MR. BROWN: Thank you.
 14:50 25 MR. HEPWORTH: I just have a couple more.

73

1 Sorry.
 2
 3 **FURTHER EXAMINATION**
 4 **BY MR. HEPWORTH:**
 14:50 5 Q. You know, we have rules in our business,
 6 too, and one rule is we can't let you out for at least
 7 two hours.
 8 A. I know that.
 9 Q. You've been through this before.
 14:50 10 MR. WILLIAMS: Actually, you just happened
 11 to be one of the most knowledgeable people around, so
 12 we're taking advantage of you and getting that from you.
 13 Q. (BY MR. HEPWORTH) I'm going to ask you
 14 about this settling scenario. This building was
 14:50 15 completed, it sounds like, around September of '03, and
 16 this accident happened in December of '05.
 17 Just from settling, you wouldn't expect
 18 that box to settle that much in that short of time,
 19 would you, unless there was some kind of an error made
 14:51 20 in construction or design?
 21 A. Wouldn't expect, but it is possible.
 22 Q. Shouldn't settle that quickly, should it?

4 who did compaction of the site, there were landscape
 14:51 5 designers, there were building designers, and then
 6 there was a builder, all involved in this overlapping
 7 process of building the sidewalk; is that fair?
 8 A. Yes, that's typical.
 9 Q. And that team basically acts in concert to
 14:52 10 achieve the result?
 11 A. Yes.
 12 MR. HEPWORTH: That's all I have.
 13

FURTHER EXAMINATION

15 **BY MR. WILLIAMS:**
 16 Q. One last point, and I don't think you were
 17 aware, Ray Patience testified that they did a one-year
 18 walkthrough on their warranty with Sportsman's
 19 Warehouse a year after it was completed, and at that
 14:52 20 time, this condition of the settling was not present.
 21 I guess my question is, assuming that Ray's
 22 testimony was accurate, does that give you any further
 23 insight into possible or likely causes or --
 24 A. No further insight. It's typical that they
 14:52 25 do the one-year walkthrough. That's done on every

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1 store. But no further insight as to what caused it.
 2 The same scenarios.
 3 MR. WILLIAMS: All right. I think you're
 4 free to go now.
 14:53 5 (Concluded at 2:53 p.m.)
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CARILEE DUSTIN, CSR, RPR
State of Utah

140000. 0142100

<u>PAGE</u>	<u>LINE</u>	<u>CORRECTION</u>	<u>REASON</u>
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This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

14:53

SIGNATURE _____ DATE _____

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WITNESS SIGNATURE CERTIFICATION

STATE OF UTAH)
) ss.
COUNTY OF _____)

GLENN ANDERSON deposes and says: That he is the witness referred to in the foregoing deposition; that he has read the same and knows the contents thereof; that the same are true of his own knowledge.

GLENN ANDERSON

SUBSCRIBED and SWORN to before me this _____
day of _____, 20 ____.

Notary Public
Residing at _____

My commission expires:

0555

'77 - 8:7, 8:9 '85 - 8:9 '97 - 11:3 '98 - 11:3, 11:8	6 62 - 3:10 66 - 3:11	altered - 36:8 altering - 52:9 alumina - 7:25 America - 7:11 amount - 34:14, 60:8 analysis - 49:23 Anderson - 1:5, 1:19, 3:4, 4:4, 5:3, 5:10, 5:12, 38:16, 38:25, 53:9, 77:6, 78:7, 78:12, 79:2 Ann - 1:3 answer - 6:10, 6:11, 15:19, 15:20, 36:4, 49:24, 61:8 anticipate - 59:17 anticipating - 59:7 anywise - 77:15 apologize - 66:24 apparent - 48:14 appear - 51:22 appropriate - 46:15, 70:3 appropriately - 70:4 appropriateness - 70:5 approval - 36:19, 37:2, 62:24, 63:18 approved - 37:4, 43:3 approximate - 28:12, 36:5 architect - 6:18, 8:15, 9:20, 23:8, 26:11, 28:10, 40:12, 40:17, 40:20, 59:6, 59:16, 64:20 Architect - 39:15 architect's - 64:15 Architects - 9:9, 9:11, 9:14, 10:7 architects - 40:16 architectural - 8:10, 10:23, 10:25, 19:1, 51:2, 67:12 architecture - 6:17, 6:18 area - 45:23, 45:24, 47:14, 48:20, 56:1, 57:7, 71:15 Arizona - 9:5 arranged - 37:16 arrives - 54:22 as-built - 65:20, 66:6 as-builts - 43:11 asphalt - 19:7, 56:24 associated - 9:6, 10:4, 20:16, 28:22, 58:19 Associates - 2:4 association - 10:7 associations -	attention - 23:20 attorney - 53:11 attorneys - 64:16 August - 1:6, 5:1, 77:17 authority - 51:7 authorized - 51:21 available - 15:5 Avenue - 2:4, 2:9 average - 59:13 awakening - 52:10 aware - 13:16, 13:19, 13:22, 47:17, 65:25, 75:17	10:3, 10:12, 10:15, 19:23, 19:24, 20:1, 20:4, 20:7, 20:11, 20:18, 20:19, 20:20, 20:22, 21:12, 21:18, 21:23, 22:2, 23:3, 23:12, 24:16, 24:18, 24:19, 24:21, 24:23, 25:1, 25:2, 25:5, 25:17, 25:25, 26:1, 26:4, 26:5, 26:8, 27:21, 28:25, 29:5, 29:8, 29:18, 32:24, 33:1, 33:6, 33:11, 33:18, 34:17, 36:2, 38:8, 41:13, 41:14, 48:15, 48:23, 49:5, 49:7, 49:12, 49:13, 49:17, 49:19, 58:3, 58:4, 58:6, 58:8, 58:15, 60:9, 60:20, 61:2, 61:5, 61:15, 65:10, 67:6, 68:1, 69:11, 69:12, 69:19, 70:13, 71:2, 72:24, 73:22, 74:18 boxes - 15:11, 16:3, 19:4, 19:6, 19:14, 19:18, 19:20, 21:11, 23:1, 23:14, 24:5, 24:15, 27:2, 32:2, 32:4, 46:10, 46:14, 46:17, 47:13, 52:15, 52:19, 56:3, 57:18, 58:3, 58:11, 58:12, 58:13, 59:14, 67:9, 67:18, 67:19, 67:20, 67:23 Boy - 12:1 Brad - 61:22 Bradley - 2:17 break - 53:4, 53:12, 69:18 breaks - 67:20 Brian - 39:15 Briefly - 42:10 bring - 14:12, 15:23, 45:10, 54:5, 54:8 Brizee - 2:9 Broadway - 2:14 brought - 45:14, 56:4 Brown - 2:13, 3:7, 3:12, 24:14, 24:19, 53:8, 53:9, 55:13, 71:7, 71:11, 73:16, 73:24 build - 20:22, 21:10, 21:11, 21:15, 39:12, 47:5, 54:12, 64:17 builder - 40:21, 75:6 building - 6:25, 10:2, 12:24, 15:23, 16:2, 18:8, 18:9, 18:23, 24:7, 24:8, 25:5, 25:20, 25:21,
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Attorneys for, Defendant Eckman & Mitchell Construction, LLC

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

EILEEN ANN MCDEVITT, an individual,
Plaintiff,

vs.

CANYON PARK MANAGEMENT I, INC.,
and Idaho Corporation, CANYON PARK,
LLC, an Idaho Limited Liability Company,
CANYON PARK DEVELOPMENT, LLC, an
Idaho Limited Liability Company, NEILSEN
& COMPANY, LLC, an Idaho Limited
Liability Company, ECKMAN & MITCHELL
CONSTRUCTION, LLC, a Utah Limited
Liability Company, SPORTSMAN'S
WAREHOUSE, INC., a Utah Corporation,
JOHN DOE and JANE DOE, husband and
wife, I through X, and BUSINESS ENTITIES
1 through X,

Defendants.

Case No. CV 07-5749

**AFFIDAVIT OF GLENN W.
ANDERSON**



County of Salt Lake)

Glenn W. Anderson, being first duly sworn upon oath, deposes and states as follows:

1. I am the Principal Architect for GA Architects, LC located in Salt Lake City, Utah. I have been employed with GA Architects since 1998. I am a licensed professional architect in numerous states, including Utah and Idaho. I graduated in 1977 with a Bachelor's of Architecture from the University of Tennessee.

2. In late 2002, GA Architects was hired by Sportsman's Warehouse Holdings to design a building plan for a Sportsman's Warehouse retail location to be built in Twin Falls, Idaho. I was the Principal Architect on the Twin Falls Sportsman's Warehouse Project (hereinafter the "Project").

3. I began the design for the Project in late 2002 or January of 2003. I completed the designs and specifications for the Project on May 2, 2003. Construction began on the Project in late spring of 2003. The Project was substantially completed in September of 2003.

4. Part of the project included laying concrete around two irrigation boxes in the front walk-way of the building that had been installed by the Developer of the Project.

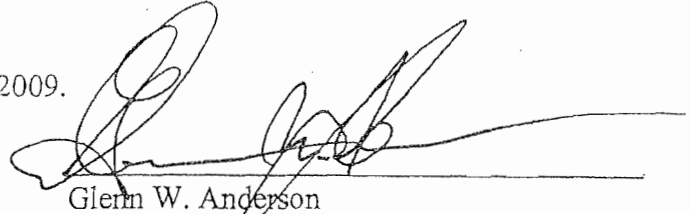
5. In September of 2003, I conducted a final walkthrough of the Project with the construction manager, Ray Patience of Eckman & Mitchell Construction, and representatives from Sportsman's Warehouse and the Developer of the retail location.

6. During the final walkthrough, a final punch-list was made of all of the remaining parts of the Project that needed to be finished and any defects that needed to be

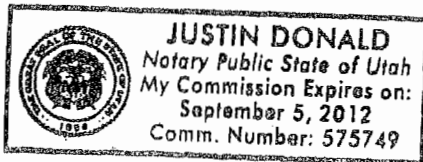
Generally, in final walkthroughs, any concrete lip more than one inch would be noted.

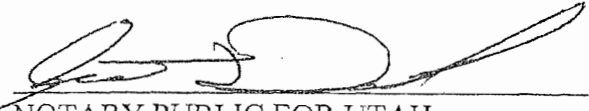
8. To my knowledge, no notation of any lip on the concrete surrounding the irrigation boxes was made.

DATED this 26 day of June, 2009.


Glenn W. Anderson

SUBSCRIBED AND SWORN to before me this 26 day of June, 2009.




NOTARY PUBLIC FOR UTAH
Residing at _____
My Commission Expires 2012

I HEREBY CERTIFY that on this 1st day of ~~June~~ June, 2009, I caused a true and correct copy of the foregoing **AFFIDAVIT OF GLENN W. ANDERSON** to be served by the method indicated below, and addressed to the following:

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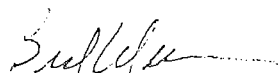
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*Attorney for Canyon Park Management I, Inc.,
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LLC, and Neilsen & Company, LLC*

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Honorable Randy J. Stoker
Twin Falls County District Court
POB 126
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DISTRICT COURT
TWIN FALLS CO. IDAHO
FILED

2009 DEC 14 PM 5:03

BY _____ CLERK

SJD DEPUTY

Attorneys for Defendant Sportsman's Warehouse, Inc.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

EILEEN ANN MCDEVITT,
an individual,

Plaintiff,

vs.

CANYON PARK MANAGEMENT I, INC.,
an Idaho corporation, CANYON PARK,
LLC, an Idaho Limited Liability Company,
CANYON PARK DEVELOPMENT, LLC,
an Idaho Limited Liability Company,
NEILSEN & COMPANY, LLC, an Idaho
Limited Liability Company, ECKMAN &
MITCHELL CONSTRUCTION, LLC, a
Utah Limited Liability Company,
SPORTSMAN'S WAREHOUSE, INC., a
Utah Corporation, JOHN DOE and JANE
DOE, husband and wife, I through X, and
BUSINESS ENTITIES I through X,

Defendants.

Case No. CV-07-5749


DEFENDANT SPORTSMAN'S
WAREHOUSE, INC.'S
OBJECTION TO PLAINTIFF'S
MOTION TO RECONSIDER

COMES NOW, Defendant Sportsman's Warehouse, Inc., by and through its counsel of record and hereby states its objection and opposition to Plaintiff's Motion to Reconsider, and as grounds therefore states as follows.

Plaintiff's motion to reconsider presents no legal or factual basis for the Court to reconsider its ruling granting summary judgment to Sportsman's Warehouse. Plaintiff states only that "the record concerning the underlying facts is incomplete and new evidence is available." The motion contains no comment on what facts are incomplete nor what new evidence is available. In essence, Plaintiff requests the Court to mine the file for a basis for overturning summary judgement. In ruling on a motion for reconsideration pursuant to Idaho R. Civ. P. 11(a)(2)(B), "the burden is on the moving party to bring the trial court's attention to new facts," and trial courts are not required to "search the record to determine if there is any new information that might change the specification of facts deemed to be established." *Coeur d'Alene Mining Company v. First National Bank of North Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1038 (1990). Plaintiff has not met her burden and the motion for reconsideration should be denied.

DATED this 14th day of December, 2009.

CAREY PERKINS LLP

By: 
Jeremy D. Brown, of the Firm
Attorneys for Defendant,
Sportsman's Warehouse, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of December, 2009, I served a true and correct copy of the foregoing *Defendant Sportsman's Warehouse, Inc.'s Objection to Plaintiff's Motion to Reconsider* on:

Jeffrey J. Hepworth
HEPWORTH ASSOCIATES
161 - 5th Avenue South, Ste 100
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Twin Falls, ID 83303-1806
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*Attorney for Defendants Canyon Park Management I, Inc.,
Canyon Park, LLC, Canyon Park Development, LLC
and Neilsen & Company, LLC*


Jeremy D. Brown

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Telephone: (208) 734-0702

Attorneys for Plaintiff

DISTRICT COURT
TWIN FALLS CO. IDAHO
FILED

2009 DEC 18 AM 11:51

BY _____ CLERK

DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

EILEEN ANN McDEVITT, an
individual,

Plaintiff,

v.

CANYON PARK MANAGEMENT I, INC.,
an Idaho corporation, CANYON PARK,
L.L.C., an Idaho Limited Liability
company, CANYON PARK
DEVELOPMENT, L.L.C., an Idaho
Limited Liability Company, NEILSEN &
COMPANY, L.L.C., an Idaho Limited
Liability Company, ECKMAN &
MITCHELL CONSTRUCTION, L.L.C., a
Utah Limited Liability Company,
SPORTSMAN'S WAREHOUSE, INC., a
Utah corporation, JOHN DOE and JANE
DOE, husband and wife, I through X,
and BUSINESS ENTITIES 1 through X,

Defendants.

Case No. CV 07-5749

NOTICE OF APPEAL

EILEEN ANN McDEVITT, an
Individual,

Appellant,

v.

SPORTSMAN'S WAREHOUSE, INC.,
a Utah corporation,

Respondent.

* * * * *

TO: THE ABOVE-NAMED RESPONDENT, AND THEIR ATTORNEY, DONALD F. CAREY
OF THE LAW FIRM OF CAREY PERKINS, LLP, 2325 WEST BROADWAY, SUITE B,
IDAHO FALLS, ID 83402-2913 AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Plaintiff/Appellant, Eileen Ann McDevitt by and through her attorneys of record, Jeffrey J. Hepworth of the law firm of Jeffrey J. Hepworth, P.A. & Associates, appeal against the above-named Defendant/Respondent, Sportsman's Warehouse, Inc., a Utah corporation, to the Idaho Supreme Court from the Memorandum Opinion Granting Sportsman's Motion for Summary Judgment entered in the above-entitled action on the 10th day of November, 2009, in the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, Case No. CV 07-5749, Honorable Randy J. Stoker presiding.

2. That the Plaintiff/Appellant has the right to appeal to the Idaho Supreme Court, and the Memorandum Opinion Granting Sportsman's Motion for Summary Judgment described in paragraph 1 above is an appealable order under and pursuant to the following rules:

NOTICE OF APPEAL -1

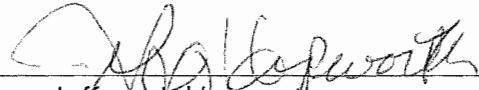
- a. The Memorandum Opinion Granting Sportsman's Motion for Summary Judgment entered against the Plaintiff is appealable pursuant to Idaho Appellate Rule 11(a)(1) and (7);
3. Preliminary Statement of the Issue on Appeal.
 - a. The Trial Court erred as a matter of law when it concluded Sportsman's Warehouse had no duty to its invitee Eileen McDevitt.
 - b. The Trial Court erred as a matter of law when it concluded Sportsman's Warehouse had no "control" over the sidewalk it had built pursuant to the lease, was negligently constructed, caused the accident, and was directly adjacent to the entrance to the store.
4. Plaintiff/Appellant requests the entire reporter's standard transcript as defined in rule 25(a), I.A.R.
5. The Plaintiff/Appellant requests the following documents to be included in the Clerk's Record in addition to those automatically included under Rule 28, I.A.R.:
 - a. All affidavits and documents submitted to the Court related to either Sportsman's Warehouse or Defendant Eckman & Mitchell Construction's Motions for Summary Judgment.
6. I certify:
 - a. That a copy of this Notice of Appeal and any request for additional transcript have been served on the reporter.
 - b. That the Court Reporter has been paid the estimated fee for preparation of the Reporter's Transcript by the Appellant/Cross-Respondent.
 - c. That the estimated fee for preparation of the Clerk's Record has been paid.

- d. That the Appellate filing fee has been paid.
- e. That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 18th day of December, 2009.

JEFFREY J. HEPWORTH, P.A.
& ASSOCIATES

By



Jeffrey J. Hepworth
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 161 5TH Avenue South, Suite 100, Twin Falls, Idaho, certifies that on the 18th day of December, 2009, he caused a true and correct copy of the NOTICE OF APPEAL to be forwarded with all required charges prepaid, by the method(s) indicated below, to the following:

Steven K. Tolman
Nicole L. Cannon
Powers & Tolman, PLLC
P.O. Box 1276
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*Attorneys for Canyon Park, LLC, Canyon Park
Development, LLC, & Neilsen & Co. LLC
Canyon Park Management I, Inc.*


Hand Delivered	_____
U.S. Mail	_____ <u>x</u> _____
Fax	_____ <u>x</u> _____
Fed. Express	_____

Donald F. Carey
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Attorneys for Sportsman's Warehouse, Inc.

Hand Delivered	_____
U.S. Mail	_____ <u>x</u> _____
Fax	_____ <u>x</u> _____
Fed. Express	_____

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Idaho Falls, ID 83405
*Attorneys for Eckman & Mitchell Construction,
LLC.*

Hand Delivered	_____
U.S. Mail	_____ <u>x</u> _____
Fax	_____ <u>x</u> _____
Fed. Express	_____



Jeffrey J. Hepworth

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Attorneys for Plaintiff

DISTRICT COURT
Fifth Judicial District
County of Twin Falls - State of Idaho

JAN 20 2010

By _____ 4:00 P.M.
Clerk
Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

EILEEN ANN McDEVITT, an
individual,

Plaintiff,

v.

CANYON PARK MANAGEMENT I, INC.,
an Idaho corporation, CANYON PARK,
L.L.C., an Idaho Limited Liability
company, CANYON PARK
DEVELOPMENT, L.L.C., an Idaho
Limited Liability Company, NEILSEN &
COMPANY, L.L.C., an Idaho Limited
Liability Company, ECKMAN &
MITCHELL CONSTRUCTION, L.L.C., a
Utah Limited Liability Company,
SPORTSMAN'S WAREHOUSE, INC., a
Utah corporation, JOHN DOE and JANE
DOE, husband and wife, I through X,
and BUSINESS ENTITIES 1 through X,

Defendants.

Case No. CV 07-5749

ORDER TO DISMISS
CANYON PARK MANAGEMENT I,
INC., CANYON PARK
DEVELOPMENT, LLC, NEILSEN
& COMPANY, LLC, AND ECKMAN
& MITCHELL CONSTRUCTION
LLC

ORDER TO DISMISS CANYON PARK MANAGMEENT I, INC., CANYON PARK
DEVELOPMENT, LLC, NEILSEN & COMPANY, LLC, AND ECKMAN & MITHCELL
CONSTRUCTION LLC - 1

* * * * *

Upon reading and filing the foregoing Stipulation,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above-entitled action be, and the same is hereby, dismissed with prejudice against Canyon Park Management I, Inc., Canyon Park LLC, Canyon Park Development, LLC, Neilsen & Company, LLC, and Eckman & Mitchell Construction, LLC, each party to bear their own costs and attorneys' fees.

DATED this 26 day of January, 2010.



Judge

CONFORMED COPIES TO:

Jeffrey J. Hepworth
Jeffrey J. Hepworth, P.A.
& Associates
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Twin Falls, ID 83303-1806

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Idaho Falls, ID 83405

ORDER TO DISMISS CANYON PARK MANAGMEENT I, INC., CANYON PARK DEVELOPMENT, LLC, NEILSEN & COMPANY, LLC, AND ECKMAN & MITHCELL CONSTRUCTION LLC - 1

JAN 20 2010

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

By

4:00 PM

Clerk

Deputy Clerk

EILEEN ANN MCDEVITT,
an individual,

Plaintiff,

vs.

CANYON PARK MANAGEMENT I,
INC.,
an Idaho corporation, CANYON PARK,
LLC, an Idaho Limited Liability
Company, CANYON PARK
DEVELOPMENT, LLC, an Idaho
Limited Liability Company, NEILSEN
& COMPANY, LLC, an Idaho Limited
Liability Company, ECKMAN &
MITCHELL CONSTRUCTION, LLC, a
Utah Limited Liability Company,
SPORTSMAN'S WAREHOUSE, INC.,
a Utah Corporation, JOHN DOE and
JANE DOE, husband and wife, I
through X, and BUSINESS ENTITIES I
through X,

Defendants.

Case No. CV-07-5749

ORDER DENYING
MOTION TO RECONSIDER

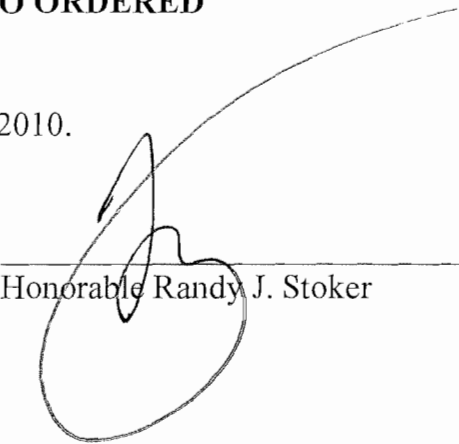
This matter came before the Court on Monday, January 11, 2010, on Plaintiff's Motion to Reconsider. Defendant Sportsman's Warehouse, Inc. was represented by Jeremy D. Brown of the firm Carey Perkins LLP. Plaintiff was represented by Jeffrey J. Hepworth of the firm Hepworth Associates.

The Court, after reviewing Plaintiff's Motion to Reconsider and Defendant Sportsman's Warehouse, Inc.'s Objection to Plaintiff's Motion to Reconsider, and after hearing oral argument, and for reasons stated on the record;

DOES HEREBY ORDER that Plaintiff's Motion to Reconsider is DENIED.

IT IS SO ORDERED

DATED this 20 day of January, 2010.



Honorable Randy J. Stoker

CLERK'S CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am a duly certified Clerk of this Court, and on this 22 day of Jan, 2010, I served a true and correct copy of the foregoing on:

Jeffrey J. Hepworth
HEPWORTH ASSOCIATES
161 - 5th Avenue South, Ste 100
PO Box 1806
Twin Falls, ID 83303-1806
(208) 734-0702
Attorneys for Plaintiff

[☒] U.S. Mail, postage prepaid
[☐] Hand-Delivered
[☐] Overnight Mail
[☐] Facsimile @ (208) 736-0041

Bradley J. Williams, Esq.
MOFFATT, THOMAS, BARRETT,
ROCK & FIELDS, CHTD.
420 Memorial Drive
P.O. Box 51505
Idaho Falls, ID 83405
(208) 522-6700

Attorney for Defendant Eckman & Mitchell Construction, LLC

☒ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile @ (208) 522-5111

Steven K. Tolman, Esq.
POWERS TOLMAN, PLLC
132 3rd Avenue East
P.O. Box 1276
Twin Falls, ID 83303
(208) 733-5566

*Attorney for Defendants Canyon Park Management I, Inc.,
Canyon Park, LLC, Canyon Park Development, LLC
and Neilsen & Company, LLC*

☒ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile @ (208) 733-5444

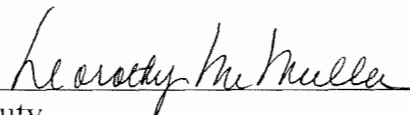
Jeremy D. Brown, Esq.
CAREY PERKINS LLP
2325 West Broadway, Suite B
Idaho Falls, Idaho 83402-2913
(208) 529-0000

Attorney for Defendant(s)

☒ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile @ (208) 529-0005

KRISTINA GLASCOCK

Clerk of the District Court



Deputy

DISTRICT COURT
TWIN FALLS CO. IDAHO
FILED

2010 FEB -2 PM 4:56

BY _____ CLERK
_____ DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

Eileen Ann McDevitt,

Plaintiff,

vs.

Canyon Park Management I, Inc *et. al*,
Eckman & Mitchell Construction LLC,
and Sportsman's Warehouse, Inc.

Defendants.

CASE NO. CV 2007-5749

JUDGMENT

The Court filed an order of dismissing Defendant Sportsman's Warehouse, Inc on November 17, 2009. The Court then filed an order dismissing the remaining Defendants on January 20, 2010.

THEREFORE IT IS HEREBY ORDERED that the above captioned matter is dismissed in its entirety. This Judgment shall constitute a final judgment for the purposes of Idaho Appellate Rule 11.

Dated this 2 day of February 2010.

Randy J. Stoker
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 2 day of February 2010, I caused to be served a true and correct copy of the foregoing, by the method indicated below, and addressed to the following:

Jeremy Brown
Carey Perkins LLP
2325 West Broadway Suite B
Idaho Falls, Idaho 83402-2913

☒ U.S. Mail
☐ Hand delivered
☐ Faxed
☐ Court Folder

Jeffrey Hepworth
Attorney at Law
P.O. Box 1806
Twin Falls, Idaho 83303-1806

☐ U.S. Mail
☐ Hand delivered
☐ Faxed
☒ Court Folder

Nicole Cannon
Tolman and Brizee, P.C.
P.O. Box 1276
Twin Falls, Idaho 83303-1276

☒ U.S. Mail
☐ Hand delivered
☐ Faxed
☐ Court Folder

Bradley J. Williams
Ben Rithcie
Moffatt, Thomas, Barrett, Rock and Fields
P.O. Box 51505
Idaho Falls, Idaho 83405

☒ U.S. Mail
☐ Hand delivered
☐ Faxed
☐ Court Folder


Clerk

cc: Supreme Court

Jeffrey J. Hepworth, ISB#3455
JEFFREY J. HEPWORTH, P.A.
& ASSOCIATES
161 5th Avenue South, Suite 100
P.O. Box 1806
Twin Falls, ID 83303-1806
Telephone: (208) 734-0702

Attorneys for Plaintiff

DISTRICT COURT
TWIN FALLS CO. IDAHO
FILED

2018 FEB -3 PM 3:56

BY _____ CLERK
_____ DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

EILEEN ANN McDEVITT, an
individual,

Plaintiff,

v.

CANYON PARK MANAGEMENT I, INC.,
an Idaho corporation, CANYON PARK,
L.L.C., an Idaho Limited Liability
company, CANYON PARK
DEVELOPMENT, L.L.C., an Idaho
Limited Liability Company, NEILSEN &
COMPANY, L.L.C., an Idaho Limited
Liability Company, ECKMAN &
MITCHELL CONSTRUCTION, L.L.C., a
Utah Limited Liability Company,
SPORTSMAN'S WAREHOUSE, INC., a
Utah corporation, JOHN DOE and JANE
DOE, husband and wife, I through X,
and BUSINESS ENTITIES 1 through X,

Defendants.

Case No. CV 07-5749

**JUDGMENT DISMISSING
PLAINTIFF'S COMPLAINT
AGAINST DEFENDANT
SPORTSMAN'S WAREHOUSE,
INC.**

JUDGMENT DISMISSING PLAINTIFF'S COMPLAINT AGAINST DEFENDANT
SPORTSMAN'S WAREHOUSE, INC. - 1

Pursuant to I.R.C.P. 58(a), this Court enters Judgment dismissing the Plaintiff's Complaint against Sportsman's Warehouse, Inc. This Judgment is supported by the Order Denying Motion to Reconsider filed January 20, 2010. Wherefore, Sportsman's Warehouse, Inc.'s prayer requesting dismissal of Plaintiff's Complaint is granted.

DATED this 7 day of February, 2010.

Judge

CONFORMED COPIES TO:

Jeffrey J. Hepworth
Jeffrey J. Hepworth, P.A.
& Associates
P.O. Box 1806
Twin Falls, ID 83303-1806

Carey Perkins, LLP
2325 West Broadway, Suite B
Idaho Falls, ID 83402-2913

Court box

U.S. Mail

*2-3-10
Sham Cooper*

CC: Supreme Court - appeals

JUDGMENT DISMISSING PLAINTIFF'S COMPLAINT AGAINST DEFENDANT
SPORTSMAN'S WAREHOUSE, INC. - 1

Jeffrey J. Hepworth, ISB#3455
JEFFREY J. HEPWORTH, P.A.
& ASSOCIATES
161 5th Avenue South, Suite 100
P.O. Box 1806
Twin Falls, ID 83303-1806
Telephone: (208) 734-0702

Attorneys for Plaintiff

DISTRICT COURT
TWIN FALLS CO., IDAHO
FEB -8

2010 FEB -8 PM 4:12

BY SP CLERK
DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

* * * * *

EILEEN ANN McDEVITT, an
individual,

Plaintiff,

v.

CANYON PARK MANAGEMENT I, INC.,
an Idaho corporation, CANYON PARK,
L.L.C., an Idaho Limited Liability
company, CANYON PARK
DEVELOPMENT, L.L.C., an Idaho
Limited Liability Company, NEILSEN &
COMPANY, L.L.C., an Idaho Limited
Liability Company, ECKMAN &
MITCHELL CONSTRUCTION, L.L.C., a
Utah Limited Liability Company,
SPORTSMAN'S WAREHOUSE, INC., a
Utah corporation, JOHN DOE and JANE
DOE, husband and wife, I through X,
and BUSINESS ENTITIES 1 through X,

Defendants.

Case No. CV 07-5749

**AMENDED
NOTICE OF APPEAL**

EILEEN ANN McDEVITT, an
Individual,

Appellant,

v.

SPORTSMAN'S WAREHOUSE, INC.,
a Utah corporation,

Respondent.

* * * * *

TO: THE ABOVE-NAMED RESPONDENT, AND THEIR ATTORNEY, DONALD F. CAREY
OF THE LAW FIRM OF CAREY PERKINS, LLP, 2325 WEST BROADWAY, SUITE B,
IDAHO FALLS, ID 83402-2913 AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Plaintiff/Appellant, Eileen Ann McDevitt by and through her attorneys of record, Jeffrey J. Hepworth of the law firm of Jeffrey J. Hepworth, P.A. & Associates, appeal against the above-named Defendant/Respondent, Sportsman's Warehouse, Inc., a Utah corporation, to the Idaho Supreme Court from the Judgment dated February 2, 2010, and the Judgment Dismissing Complaint Against Sportsman's Warehouse, Inc. dated February 3, 2010. The judgments are based upon the Opinion Granting Sportsman's Motion for Summary Judgment dated November 10, 2009, and the Order Denying Plaintiff's Motion to Reconsider dated January 20, 2010.

2. That the Plaintiff/Appellant has the right to appeal to the Idaho Supreme Court, and the judgments and orders described in paragraph 1 above are appealable under and pursuant to the following rules:

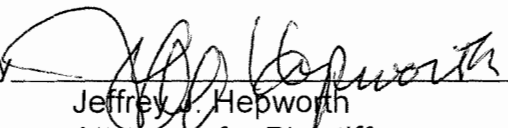
AMENDED NOTICE OF APPEAL -1

- a. The final judgments are appealable pursuant to I.A.R. 11(a)(1);
3. Preliminary Statement of the Issue on Appeal.
 - a. The Trial Court erred as a matter of law when it concluded Sportsman's Warehouse had no duty to its invitee Eileen McDevitt.
 - b. The Trial Court erred as a matter of law when it concluded Sportsman's Warehouse had no "control" over the sidewalk it had built pursuant to the lease, was negligently constructed, caused the accident, and was directly adjacent to the entrance to the store.
4. Plaintiff/Appellant requests the transcript of the Summary Judgment hearing October 26, 2009, and the Motion to Reconsider hearing on January 11, 2010.
5. The Plaintiff/Appellant requests the following documents to be included in the Clerk's Record in addition to those automatically included under Rule 28, I.A.R.:
 - a. All affidavits and documents submitted to the Court related to either Sportsman's Warehouse or Defendant Eckman & Mitchell Construction's Motions for Summary Judgment;
 - b. The Affidavit of Alexandra Caval dated September 14, 2009;
 - c. The Affidavit of Jeffrey J. Hepworth dated November 19, 2009;
 - d. The Opinion Granting Sportsman's Motion for Summary Judgment dated November 10, 2009; and
 - e. Order Denying Plaintiff's Motion for Reconsideration dated January 20, 2010.
6. I certify:
 - a. That a copy of this Notice of Appeal and any request for additional transcript have been served on the reporter.

- b. That the Court Reporter has been paid the estimated fee for preparation of the Reporter's Transcript by the Appellant/Cross-Respondent.
- c. That the estimated fee for preparation of the Clerk's Record has been paid.
- d. That the Appellate filing fee has been paid.
- e. That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 8th day of February, 2010.

JEFFREY J. HEPWORTH, P.A.
& ASSOCIATES

By 
Jeffrey J. Hepworth
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 161 5TH Avenue South, Suite 100, Twin Falls, Idaho, certifies that on the 8th day of February, 2010, he caused a true and correct copy of the AMENDED NOTICE OF APPEAL to be forwarded with all required charges prepaid, by the method(s) indicated below, to the following:

Donald F. Carey
Brian K. Eggleston
Carey Perkins, LLP
2325 West Braodway, Suite B
Idaho Falls, ID 83402-2913

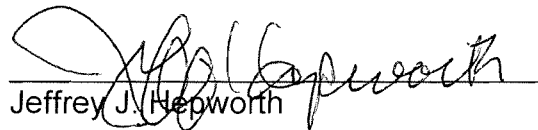
Hand Delivered _____
U.S. Mail x
Fax _____
Fed. Express _____

Linda Ledbetter
570 Rim View Drive
Twin Falls, ID 83338

Hand Delivered _____
U.S. Mail x
Fax _____
Fed. Express _____

Sabrina Vasquez
Twin Falls County Courthouse
P.O. Box 126
Twin Falls, ID 83303-0126

Hand Delivered _____
U.S. Mail x
Fax _____
Fed. Express _____


Jeffrey J. Hepworth

Donald F. Carey, ISB #4392
Jeremy D. Brown, ISB #6610
CAREY PERKINS LLP
2325 West Broadway, Suite B
Idaho Falls, Idaho 83402-2913
Telephone: (208) 529-0000
Facsimile: (208) 529-0005
E-mail: jdbrown@careyperkins.com

DISTRICT COURT
TWIN FALLS CO., IDAHO
FILED
ORIGINAL

2010 FEB 19 AM 10:59

BY _____ CLERK
_____ DEPUTY

Attorneys for Defendant Sportsman's Warehouse, Inc.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

EILEEN ANN MCDEVITT,
an individual,

Plaintiff,

vs.

CANYON PARK MANAGEMENT I, INC.,
an Idaho corporation, CANYON PARK,
LLC, an Idaho Limited Liability Company,
CANYON PARK DEVELOPMENT, LLC,
an Idaho Limited Liability Company,
NEILSEN & COMPANY, LLC, an Idaho
Limited Liability Company, ECKMAN &
MITCHELL CONSTRUCTION, LLC, a
Utah Limited Liability Company,
SPORTSMAN'S WAREHOUSE, INC., a
Utah Corporation, JOHN DOE and JANE
DOE, husband and wife, I through X, and
BUSINESS ENTITIES I through X,

Defendants.

Case No. CV-07-5749

DEFENDANT/RESPONDENTS'
SPORTSMAN'S WAREHOUSE
INC.'S REQUEST FOR
ADDITIONAL CLERKS RECORD

TO: THE ABOVE NAMED PLAINTIFF/APPELLANT AND THE PARTY'S
ATTORNEY, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN, that Defendant/Respondent, in the above-entitled proceeding, Sportsman's Warehouse, Inc., hereby requests, pursuant to Rule 19, I.A.R., the inclusion of the following material in the clerk's record in addition to that required to be included by the I.A.R. and the Notice of Appeal:


Clerk's Record:

- Affidavit of Jeremy D. Brown in Support of Defendant Sportsman's Warehouse, Inc.'s Motion for Summary Judgment and attached exhibits, filed on 9-25-09;
- Memorandum in Support of Motion for Summary Judgment, filed on 9-25-09;
- Defendant Sportsman's Warehouse Motion for Summary Judgment, filed on 9-25-09;
- Affidavit of Bill Baer, Controller of Sportsman's Warehouse and attached exhibits. filed on 9-25-09;
- Reply Brief in Further Support of Defendant Sportsman's Warehouse, Inc.'s Motion for Summary Judgment, filed on 10-19-09;
- Defendant Sportsman's Warehouse Objection to Plaintiff's Motion for Reconsideration, filed on 12-14-09.

I further certify that this request for additional record has been served upon the clerk of the district court and upon all parties required to be served pursuant to Rule 20.

DATED this 18th day of February , 2010.

CAREY PERKINS LLP

By: 
Jeremy D. Brown, of the Firm
Attorneys for Defendant,
Sportsman's Warehouse, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of February, 2010, I served a true and correct copy of the foregoing *Defendant/Respondent Request for Additional Clerks Records* on:

Jeffrey J. Hepworth
HEPWORTH ASSOCIATES
161 - 5th Avenue South, Ste 100
PO Box 1806
Twin Falls, ID 83303-1806
(208) 734-0702
Attorneys for Plaintiff

[☒] U.S. Mail, postage prepaid
[☐] Hand-Delivered
[☐] Overnight Mail
[☐] Facsimile @ (208) 736-0041

Bradley J. Williams, Esq.
MOFFATT, THOMAS, BARRETT,
ROCK & FIELDS, CHTD.
420 Memorial Drive
P.O. Box 51505
Idaho Falls, ID 83405
(208) 522-6700

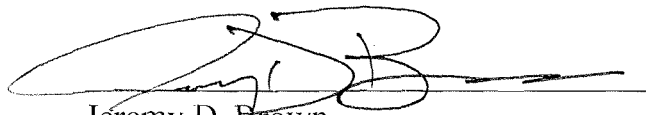
[☒] U.S. Mail, postage prepaid
[☐] Hand-Delivered
[☐] Overnight Mail
[☐] Facsimile @ (208) 522-5111

Attorney for Defendant Eckman & Mitchell Construction, LLC

Steven K. Tolman, Esq.
POWERS TOLMAN, PLLC
132 3rd Avenue East
P.O. Box 1276
Twin Falls, ID 83303
(208) 733-5566

[☒] U.S. Mail, postage prepaid
[☐] Hand-Delivered
[☐] Overnight Mail
[☐] Facsimile @ (208) 733-5444

*Attorney for Defendants Canyon Park Management I, Inc.,
Canyon Park, LLC, Canyon Park Development, LLC
and Neilsen & Company, LLC*


Jeremy D. Brown

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

EILEEN ANN McDEVITT,

Appellant,

vs.

SPORTSMAN'S WAREHOUSE, INC.,

Respondent.

SC DOCKET NO. 37244-2010


CV-2007-5749

TO: THE CLERK OF THE IDAHO SUPREME COURT and
THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE OF TRANSCRIPT LODGED

NOTICE IS HEREBY GIVEN that on February 11th, 2010,
I lodged a reporter's transcript of all assigned appellate
transcripts, consisting of the motion for summary judgment
and motion to vacate trial **October 26, 2009**, 54 pages in
length, for the above-entitled appeal with the Clerk of the
District Court, County of Twin Falls, in the Fifth Judicial
District.

A PDF copy has been emailed to sctfilings@idcourts.net
and to respective counsel at ltaylor@idalawyer.com and
jdbrown@careyperkins.com.


Linda Ledbetter
Official Court Reporter

AL DISTRICT OF
OF TWIN FALLS

CLERK
DEPUTY

SC No. 37244-2010

CV 2007-5749

NOTICE OF LODGING

Sabrina Vasquez
Official Court Reporter

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

EILEEN MCDEVITT, an individual)

Plaintiff/Appellant,)

vs)

SPORTSMAN'S WAREHOUSE, INC., a)
Utah Corporation,)

Defendant/Respondent,)

SUPREME COURT NO 37244-2009
DISTRICT COURT NO. CV 07-5749

CLERK'S CERTIFICATE

CANYON PARK MANAGEMENT I, INC.,)
An Idaho corporation, CANYON PARK)
L.L.C., an Idaho Limited Liability Company,)
CANYON PARK DEVELOPMENT, L.L.C.,)
An Idaho Limited Liability Company,)
NEILSON & COMPANY, L.L.C., an)
Idaho Limited Liability Company,)
ECKMAN & MITCHELL CONSTRUCTION,)
L.L.C., a Utah Limited Liability Company,)
JOHN DOE and JANE DOE, husband and)
wife, I through X, and BUSINESS ENTITIES)
I through X,)

Defendants.)

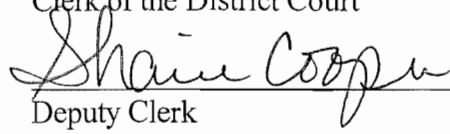
I, KRISTINA GLASCOCK, Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, do hereby certify that the foregoing CLERK'S RECORD on Appeal in this cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents requested by Appellate Rule 28.

I do further certify that there are no exhibits, offered or admitted in the above-entitled cause.

CLERK'S CERTIFICATE

WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 25th day of March, 2010.

KRISTINA GLASCOCK
Clerk of the District Court


Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

EILEEN MCDEVITT, an individual)

Plaintiff/Appellant,)

vs)

SPORTSMAN'S WAREHOUSE, INC., a)
Utah Corporation,)

Defendant/Respondent,)

SUPREME COURT NO 37244-2009
DISTRICT COURT NO. CV 07-5749

CERTIFICATE OF SERVICE

CANYON PARK MANAGEMENT I, INC.,)
An Idaho corporation, CANYON PARK)
L.L.C., an Idaho Limited Liability Company,)
CANYON PARK DEVELOPMENT, L.L.C.,)
An Idaho Limited Liability Company,)
NEILSON & COMPANY, L.L.C., an)
Idaho Limited Liability Company,)
ECKMAN & MITCHELL CONSTRUCTION,)
L.L.C., a Utah Limited Liability Company,)
JOHN DOE and JANE DOE, husband and)
wife, I through X, and BUSINESS ENTITIES)
I through X,)

Defendants.)

I, KRISTINA GLASCOCK, Clerk of the District Court of the Fifth Judicial District of
the State of Idaho, in and for the County of Twin Falls, do hereby certify that I have personally
served or mailed, by United States Mail, one copy of the CLERK'S RECORD and
REPORTER'S TRANSCRIPT to each of the Attorneys of Record in this cause as follows:

Jeffrey Hepworth
JEFFREY J. HEPWORTH, P.A.
& ASSOCIATES
P. O. Box 1806
Twin Falls, ID 83303-1806

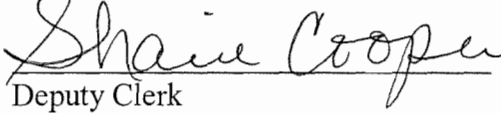
ATTORNEY FOR APPELLANT

Jeremy D. Brown
CAREY PERKINS LLP
2325 West Broadway, Suite B
Idaho Falls, ID 83303-1806

ATTORNEY FOR RESPONDENT

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said this 31st day of March, 2010.

KRISTINA GLASCOCK
Clerk of the District Court


Deputy Clerk